

No. 12534

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United States  
Court of Appeals  
For the Ninth Circuit.

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WINSTON CHURCHILL HENRY,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
District of Hawaii.

FILED

JUL 24 1950

PAUL P. O'BRIEN,



No. 12534

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Court of Appeals  
for the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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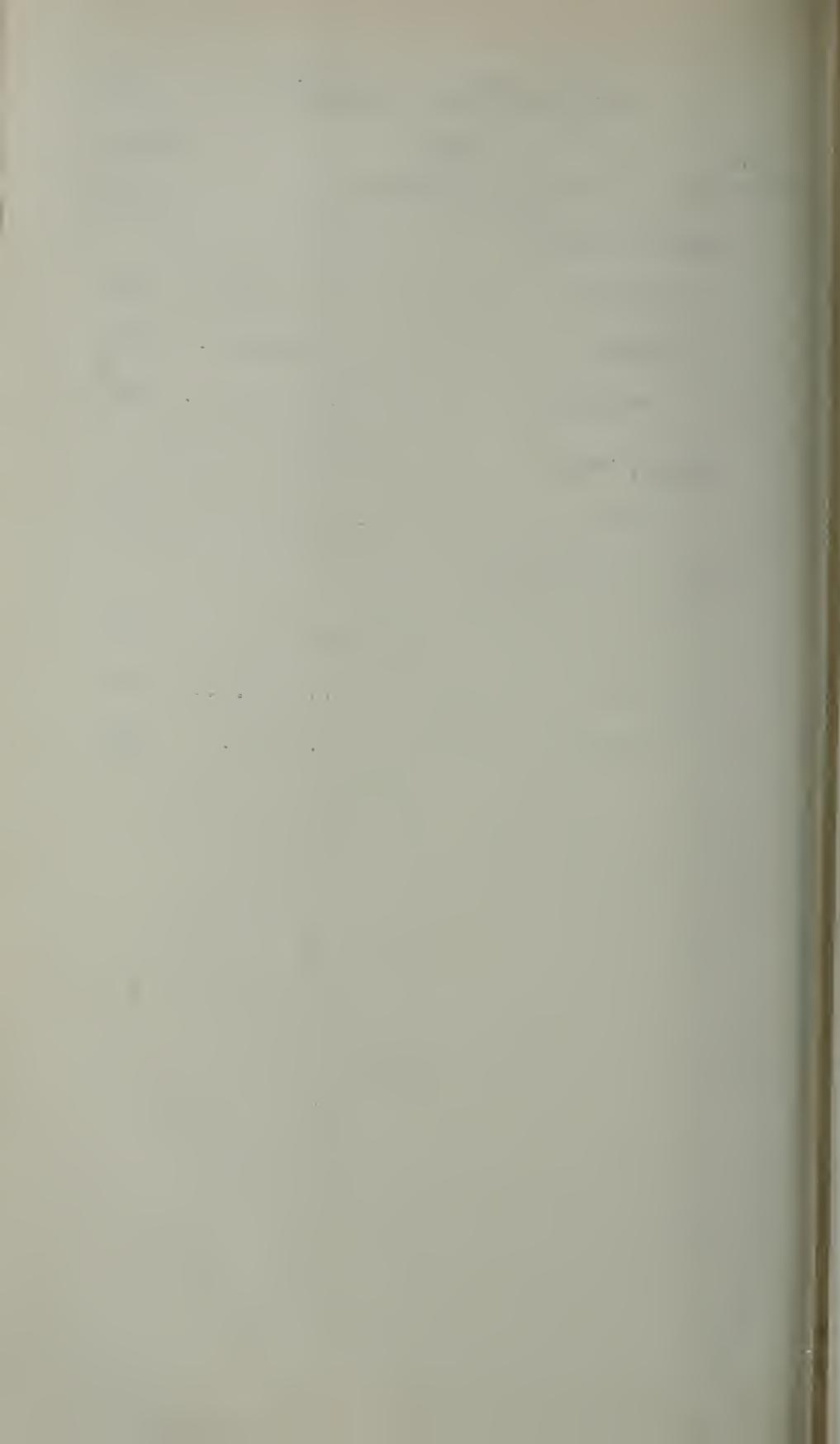
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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

UNITED STATES DISTRICT ATTORNEY, By  
HOWARD K. HODDICK, ESQ., and  
NAT RICHARDSON, JR., ESQ.,

Assistant United States  
District Attorneys,

Honolulu, T. H.

For the Plaintiff,  
United States of America.

LANDAU and FAIRBANKS, By  
SAMUEL LANDAU, ESQ.,

301 McCandless Building,  
Honolulu, T. H.,

O. P. SOARES, ESQ.,

Union Trust Building,  
Honolulu, T. H.,

For the Defendant,

Winston Churchill Henry.

In the United States District Court for the  
District of Hawaii

Cr. No. 10,253

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

WINSTON CHURCHILL HENRY,  
Defendant.

INDICTMENT

(26 U.S.C. Section 2593)  
(26 U.S.C. Section 2553(a))

Count I.

The Grand Jury Charges:

That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias "Frisco Shorty," did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.

Count II.

The Grand Jury Further Charges:

That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias "Frisco Shorty," the identical person named in Count I of this Indictment, being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, United States Code, did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes without having paid such tax in violation of Section 2593, Title 26, United States Code.

Dated: Honolulu, T. H., this 15th day of September, 1949.

A True Bill.

/s/ HERMAN L. NICKET,  
Foreman, Grand Jury.

/s/ RAY J. O'BRIEN,  
United States Attorney.

I hereby order a Bench Warrant to issue forthwith on the within Indictment for the arrest of the defendant named therein, bail being fixed at \$.....

/s/ D. E. METZGER,  
Judge, United States District Court for the District  
of Hawaii.

Presented in open Court by the Grand Jury on Sept. 15, 1949.

/s/ WM. F. THOMPSON, JR.,  
Clerk.

[Endorsed]: Filed Sept. 15, 1949.

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[Title of Court and Cause.]

### MINUTE ORDER

Wednesday, September 28, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Samuel Landau, his counsel. This case was called for hearing on motion for bill of particulars.

Following argument by respective counsel, the Court ordered that this case be continued to October 5, 1949, at 10 a.m. for further consideration and presentation of additional authorities by respective counsel.

[Title of District Court and Cause.]

### MOTION FOR BILL OF PARTICULARS

Comes now defendant Winston Churchill Henry, by his attorneys, Landau & Fairbanks, and moves and demands that the United States of America furnish him with a bill of particulars of the matters set forth in the indictment on file herein, especially the matters hereinafter set forth:

#### As to Count I.

The time, place and circumstances of the alleged purchase and the person from whom the defendant is alleged to have purchased the articles mentioned in said Count I.

#### As to Count II.

1. How and in what manner the defendant became a transferee required to pay the special tax imposed by Section 2590(a), Title 26, United States Code.

2. The time, place and circumstances under which the defendant became a transferee required to pay the special tax imposed by Section 2590(a), Title 26, United States Code.

3. The time, place and circumstances at and under which the defendant is alleged to have "acquired and otherwise obtained" the quantity of marihuana.

4. Whether the defendant "acquired" or "other-

wise obtained" the alleged marihuana, and if the latter, how the defendant is alleged to have "otherwise obtained" said marihuana.

Wherefore, defendant through his attorneys prays that this motion be granted and a bill of particulars be furnished him in accordance with this request.

Dated: Honolulu, T. H., this 26th day of September, 1949.

WINSTON CHURCHILL  
HENRY,  
Defendant.

By LANDAU & FAIRBANKS,  
His Attorneys.

By /s/ SAMUEL LANDAU.

#### AFFIDAVIT OF SAMUEL LANDAU

Territory of Hawaii,  
City and County of Honolulu—ss.

Samuel Landau, being first duly sworn, on oath deposes and says:

That he is a member of the firm of Landau & Fairbanks, the attorneys for the defendant above-named; that he has read Counts I and II of the indictment herein and cannot understand from said Counts exactly what the defendant is charged with having done that constituted the violation of the law; that it is impossible for your affiant to advise the defendant how to plead to these Counts and

that it is necessary, in order to properly prepare a defense, that he be more fully informed of the nature and the cause of the accusations against the defendant, and it is necessary for him to be informed with more particularity as to the matters and things in said Counts and which are requested in the foregoing motion for a bill of particulars.

That the defendant cannot safely go to trial without receiving the information requested in the said motion.

/s/ SAMUEL LAUDAU.

Subscribed and sworn to before me this 27th day of September, 1949.

/s/ [Indistinguishable.]

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires Mar. 1, 1950.

[Endorsed]: Filed Sept. 27, 1949.

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[Title of Court and Cause.]

#### MINUTE ORDER

Wednesday, October 5, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Samuel Landau, his counsel. This case was called for further hearing on motion for bill of particulars.

The Court ordered that this case be continued to October 7, 1949, at 10 a.m. for hearing.

[Title of Court and Cause.]

MINUTE ORDER

Friday, October 7, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came Mr. Samuel Landau, counsel for the defendant herein. This case was called for decision on motion for bill of particulars.

Motion for bill of particulars was denied by the Court, and exceptions were allowed the defendant.

The Court ordered that this case be continued to October 10, 1949, at 9 a.m. for plea.

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[Title of District Court and Cause.]

MOTION TO TRANSFER CASE FROM THE  
DISTRICT OF HAWAII

Comes now Winston Churchill Henry, defendant above named, by his attorneys, Landau & Fairbanks and O. P. Soares, and hereby moves this Honorable Court to transfer these proceedings to the United States District Court, Northern District of California, Southern Division, for the reason that there exists in this district so great a prejudice against him that he cannot obtain a fair and impartial trial in this district.

This motion is based upon the affidavit of the defendant herein and upon the evidence to be adduced at the time of hearing.

Dated: Honolulu, T. H., October 25, 1949.

WINSTON CHURCHILL  
HENRY,  
Defendant.

By LANDAU & FAIRBANKS and  
O. P. SOARES,  
His Attorneys.

By /s/ SAMUEL LANDAU.

**NOTICE**

To: Ray J. O'Brien, United States Attorney, District of Hawaii, Attorney for Plaintiff:

Please take notice that the foregoing motion will be presented to the Honorable J. Frank McLaughlin on Tuesday, the 1st day of November, 1949, at 2:00 o'clock p.m.

Dated: Honolulu, T. H., October 25, 1949.

LANDAU & FAIRBANKS and  
O. P. SOARES,  
Attorneys for Defendant.

By /s/ SAMUEL LANDAU.

## AFFIDAVIT

Territory of Hawaii,  
City and County of Honolulu—ss.

Winston Churchill Henry, being first duly sworn, on oath deposes and says:

That on many occasions since he was indicted, the two main newspapers having wide general circulation in the Territory of Hawaii have published articles concerning him, commenting unfavorably and prejudicially upon him; that the Honolulu Star-Bulletin, with a claimed daily circulation of approximately 80,000, published among other things a purported criminal record of your affiant, listing therein certain offenses with which your affiant was charged but not convicted of, a copy of which will be introduced at the hearing of this motion; that the said newspaper, upon a recent acquittal, headlined an article concerning the case with the phrase "Henry Beats the Rap—Again," a copy of which will be introduced at the hearing of this motion; that the Honolulu Advertiser, with a claimed daily circulation of approximately 35,000, published among other things an editorial concerning your affiant, commenting prejudicially upon your affiant; that said articles and others have caused the populace of the Territory of Hawaii to become inflamed against your affiant, and no jury picked from the citizenry of the Territory of Hawaii would be able to act in a fair and impartial manner; that because of the notoriety created by the

said newspapers, any activity of your affiant is publicized far beyond its importance and ordinary news interest; that as a result of the inflammation of public opinion by the said newspapers, citizens of the Territory of Hawaii have made comments indicating quite clearly the temper of the people and their prejudice against him, and that affiant could not get a fair and impartial trial.

Further affiant sayeth not.

/s/ WINSTON CHURCHILL  
HENRY.

Subscribed and sworn to before me this 25th day of October, 1949.

/s/ [Indistinguishable.]  
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires Mar. 1, 1950.

[Endorsed]: Filed Oct. 26, 1949.

## MINUTE ORDER

Criminal No. 10,253

UNITED STATES OF AMERICA,

vs.

WINSTON CHURCHILL HENRY.

Criminal No. 10,254

UNITED STATES OF AMERICA,

vs.

WINSTON CHURCHILL HENRY, alias  
“FRISCO SHORTY”; and KERSHAW  
WESTON.

Tuesday, November 1, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant Henry with Mr. Samuel Landau, Mr. O. P. Soares, and Mr. W. Z. Fairbanks, his counsel. These cases were called for hearing on motions to transfer case from the District of Hawaii.

Upon request of Mr. Landau, the Court ordered that these cases be continued to November 9, 1949, at 2 p.m. for hearing.

[Title of District Court and Causes.]

### MINUTE ORDER

Wednesday, November 9, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant Henry with Mr. Samuel Landau, his counsel. These cases were called for hearing on motions to transfer case from the District of Hawaii.

At 2:45 p.m., Mr. Fred Howard, civil service employee, United States Army, was called and sworn and testified on behalf of the defendant.

The witness was withdrawn from the witness stand and his testimony was stricken.

At 3:20 p.m., Mr. Thomas Lampley, employee, Honolulu Gas Company, was called and testified on behalf of the defendant.

Mr. Richard R. Williams, Reporter, Honolulu Honolulu Gas Company, was called and sworn and testified on behalf of the defendant.

Newspaper article appearing in the Honolulu Star-Bulletin, September 21, 1949, was admitted in evidence as Defendant's Exhibit No. 1, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, October 19, 1949, was admitted in evidence as Defendant's Exhibit No. 2, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, July 21, 1949, was admitted in evi-

dence as Defendant's Exhibit No. 3, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, September 27, 1949, was admitted in evidence as Defendant's Exhibit No. 4, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, October 6, 1949, was admitted in evidence as Defendant's Exhibit No. 5, marked and ordered filed.

At 3:50 p.m., Mr. Jack M. Fox, Reporter, Honolulu Advertiser, was called and sworn and testified on behalf of the defendant.

Newspaper article appearing in the Honolulu Advertiser, August 10, 1949, was admitted in evidence as Defendant's Exhibit No. 6, marked and ordered filed.

Newspaper article appearing in the Honolulu Advertiser, September 28, 1949, was admitted in evidence as Defendant's Exhibit No. 7, marked and ordered filed.

Newspaper article appearing in the Honolulu Advertiser, October 16, 1949, was admitted in evidence as Defendant's Exhibit No. 8, marked and ordered filed.

Newspaper article appearing in the Honolulu Advertiser, November 8, 1949, was admitted in evidence as Defendant's Exhibit No. 9, marked and ordered filed.

At 3:55 p.m., the Court ordered that these cases be continued to November 10, 1949, at 2 p.m. for further hearing.

[Title of District Court and Cause.]

## MINUTE ORDER

Thursday, November 10, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant Henry with Mr. Samuel Landau, his counsel. These cases were called for further hearing on motions to transfer case from the District of Hawaii.

At 2:10 p.m., Mr. Arthur McGraw, businessman, was called and sworn and testified on behalf of the defendant.

At 2:30 p.m., the defendant Henry was called and sworn and testified on his own behalf.

At 2:36 p.m., Miss Mary Noonan, Secretary, Republican Club of Hawaii, was called and sworn and testified on behalf of the defendant.

At 3:15 p.m., the defense rested.

At 3:18 p.m., Mr. Nelson B. Lansing, real estate salesman, was called and sworn and testified on behalf of the United States.

At 3:31 p.m., Mr. Byron Kent Murphy, real estate broker, was called and sworn and testified on behalf of the United States.

The government then rested.

At 3:40 p.m., Mr. Edward Berman, attorney-at-law, was called and sworn and testified on behalf of the defendant.

At 3:50 p.m., argument was had by Mr. Landau.

At 4:18 p.m., argument was had by Mr. Hoddick, followed at 4:30 p.m., by Mr. Landau in his closing argument.

At 4:45 p.m., the Court denied said motions without prejudice.

The Court then ordered that Criminal No. 10-253 be set for trial on January 3, 1950, at 9 a.m., and that all motions that are to be filed shall be disposed of prior to that time.

[Title of Court and Cause.]

**MINUTE ORDER**

Wednesday, January 4, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came the defendant herein with Mr. Samuel Landau, Mr. W. Z. Fairbanks, and Mr. O. P. Soares, his counsel. This case was called for trial.

At 3:19 p.m., the following jurors were duly empaneled and sworn to try the issues herein:

Cornelius Mulder	Thomas K. Cook
Francis N. Todd	Leo F. Andre
Louis A. Wills	Herbert B. Webb
William H. Kruse	John M. H. Kramer
Ralph H. Moyers	Howard F. Mosher
George E. Richardson	Edgard Kina

At 3:25 p.m., the Court ordered that this case be continued to January 5, 1950, at 10 a.m. for further trial.

---

[Title of Court and Cause.]

**MINUTE ORDER**

Thursday, January 5, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States

District Attorneys, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P. Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 10:06 a.m., Sgt. Richard Sasaki, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

One bottle containing filled capsules was marked for identification as United States No. 1.

One photograph showing Sgt. Sasaki was marked for identification as United States No. 2, and was admitted in evidence as United States Exhibit "A," marked and ordered filed.

Mr. Roy F. Case, Police Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 12 noon, the Court ordered that this case be continued to 2 p.m. this day for further trial.

At 2 p.m., the witness Case resumed the witness stand and testified further.

Two photographs of a sun couch were marked for identification as United States Nos. 3 and 4, and were admitted in evidence as United States Exhibits "B" and "C," marked and ordered filed.

One small bottle was marked for identification as United States No. 5.

At 3:05 p.m., Mr. Francis C. Ferry, Police Officer, Honolulu Police Department, was called and

sworn and testified on behalf of the United States.

One box was marked for identification as United States No. 6.

A paper bag was marked for identification as United States No. 7.

At 3:38 p.m., Mr. Harry L. Pestana, Police Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

An envelope containing three cigarettes wrapped in brown paper was marked for identification as United States No. 8.

Three cigarettes wrapped in white paper were marked for identification as United States No. 9.

At 4:02 p.m., the Court ordered that this case be continued to January 6, 1950, at 10 a.m. for further trial.

---

[Title of Court and Cause.]

### MINUTE ORDER

Friday, January 6, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P. Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the

jury heretofore empaneled and sworn to try the issues herein was present.

At 10:05 a.m., the witness Pestana resumed the witness stand and testified further.

At 10:25 a.m., Mr. Paul Schaffer, Police Officer, Honolulu Police Department, was called and sworn and was withdrawn without testifying.

At 10:30 a.m., Mr. William K. Wells, Acting Supervisor, Bureau of Narcotics, was called and sworn and testified on behalf of the United States.

Photograph showing a portion of the premises was marked for identification as United States No. 10.

At 11:10 a.m., the jury was excused from the courtroom, and at 11:22 a.m., the witness Wells was withdrawn from the witness stand.

The jury was summoned, and at 11:24 a.m., Mr. Gilbert J. Carr, Chemist, United States Customs Service, was called and sworn and testified on behalf of the United States.

At 11:47 a.m., the Court ordered that this case be continued to 2 p.m. this day for further trial.

At 2:05 p.m., the witness Carr resumed the witness stand and testified further.

United States No. 1 for identification was admitted in evidence as United States Exhibit "D," marked and ordered filed.

United States No. 5 for identification was admitted in evidence as United States Exhibit "E," marked and ordered filed.

United States No. 7 for identification was ad-

mitted in evidence as United States Exhibit "F," marked and ordered filed.

United States No. 8 for identification was admitted in evidence as United States Exhibit "G," marked and ordered filed.

United States No. 9 for identification was admitted in evidence as United States Exhibit "H," marked and ordered filed.

United States No. 6 for identification was admitted in evidence as United States Exhibit "I," marked and ordered filed.

At 2:22 p.m., Mr. Howard A. Patterson, Deputy Collector of Internal Revenue, was called and sworn and testified on behalf of the United States.

At 2:29 p.m., Mr. Theodore P. Kinney, Police Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 2:47 p.m., the government rested.

At 3:10 p.m., the Court ordered that this case be continued to January 9, 1950, at 10 a.m. for further trial.

---

[Title of Court and Cause.]

#### MINUTE ORDER

Monday, January 9, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P.

Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 10:18 a.m., motion for mistrial was made by Mr. Landau, and was denied by the Court.

At 10:26 a.m., the witness Carr was recalled to the witness stand and testified further.

At 10:27 a.m., the government rested.

Motions were made by Mr. Landau to strike the testimony of all the government witnesses and also to strike certain portions of the testimony of certain witnesses, and for a directed verdict as to Counts I and II.

At 10:35 a.m., the jury was excused until 2 p.m. this day.

Argument was then had by Mr. Landau and Mr. Hoddick on each motion to strike.

Motions to strike were denied by the Court.

At 11:52 a.m., argument was had by Mr. Landau and Mr. Hoddick on each motion for directed verdict.

At 12:32 p.m., the Court ordered that this case be continued to 1:30 p.m. this day for further argument.

At 1:32 p.m., argument was continued.

Motions for directed verdict were denied by the Court.

At 2:45 p.m., the jury was summoned and was advised by the Court that motions to strike and for directed verdict were denied.

At 2:50 p.m., Mrs. Agnes L. Kellett, Record Custodian, Rent Control, City and County of Honolulu, was called and sworn and testified on behalf of the defendant.

At 2:55 p.m., the defendant rested.

The jury was then excused until January 10, 1950, at 1:30 p.m., and the matter of settling instructions were taken up in chambers.

At 4:10 p.m., the Court ordered that this case be continued to January 10 at 9 a.m. for further settling of instructions.

---

[Title of Court and Cause.]

### MINUTE ORDER

Tuesday, January 10, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came Mr. Samuel Landau and Mr. O. P. Soares, counsel for the defendant herein.

At 9 a.m., the further settlement of instructions was taken up in chambers.

At 11:50 a.m., the Court ordered that this case be continued to 1:30 p.m., this day for further settlement of instructions.

At 2 p.m., this case was called for further trial. The defendant was present.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

Opening argument was had by Mr. Hoddick.

At 2:18 p.m., argument was had by Mr. Soares, followed at 3:22 p.m., by Mr. Hoddick in his closing argument.

At 3:30 p.m., the Court instructed the jury.

At 4:30 p.m., the jury was excused and Mr. Landau excepted to the Court's refusal to give Defendant's Requested Instructions Nos. 1, 2, 3, 6, and 8 and to the Court's giving United States Instructions Nos. 9 and 10.

At 4:35 p.m., the jury was summoned, and Mr. Otto F. Heine, and Mr. George E. Bruns, United States Marshal and Deputy United States Marshal, respectively, were sworn as bailiffs to take charge of the jury during its deliberations.

At 5:45 p.m., upon request of the jury through its foreman, Mr. Leo F. Andre, the Court further instructed the jurors on the matter of "possession."

At 6 p.m., the Court ordered the jury to retire to deliberate further after Mr. Landau had excepted to the giving of the instruction requested by the jury.

At 6:10 p.m., the jury left for dinner, returning at 7:55 p.m., to deliberate further.

At 10:50 p.m., the jury requested, in the presence of respective counsel and the defendant, that they retire for the night and that they be furnished with a transcript of the Court's instructions.

The Court allowed the jury to retire for the night and continued the matter of instructions until January 11, 1950, at 9 a.m.

Upon request of Mr. Heine, the Court ordered that Mr. Thomas R. Clark, Deputy United States Marshal, be sworn as bailiff herein to take charge of the jury during its deliberations.

---

[Title of Court and Cause.]

### MINUTE ORDER

Wednesday, January 11, 1950

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P. Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 9:12 a.m., the Court outlined various portions of the evidence to the jury, following which the jury was instructed to retire and deliberate further. Mr. Landau objected to the instructions given by the Court.

At 3:40 p.m., the jury, in the presence of respective counsel and the defendant, requested that they be allowed to view the premises and that they be furnished a copy of the transcript of testimony.

At 3:45 p.m., the Court, jury, counsel, clerk, and court reporter proceeded to view the premises at 803-807 Hausten Street, returning at 5:10 p.m.

Testimony of the witnesses Sasaki, Case, and Wells, was read to the jury by the court reporter.

At 7:07 p.m., the jury retired for the night.

[Title of Court and Cause.]

MINUTE ORDER

Thursday, January 12, 1950

At 10 a.m., on this day after having retired for the night in custody of the bailiffs, the jury returned to the courtroom to deliberate further upon a verdict in this case.

At 2:45 p.m., the jury appeared and in the presence of respective counsel and the defendant and through their foreman returned the following verdict of guilty which was ordered to be placed on file.

Cr. No. 10,253

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant,

VERDICT

(2553(a) U.S.C. Title 26)

(2593 U.S.C. Title 26)

As to Count I of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Winston Churchill Henry Guilty.

As to Count II of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled

cause, do hereby find the Defendant, Winston Churchill Henry Guilty.

Dated: Honolulu, T. H., this 12th day of January, 1950.

(s) LEO F. ANDRE,  
Foreman.

Upon request of Mr. Landau, the jury was polled by the Court as to the verdict returned, the verdict being confirmed by each juror.

Mr. Landau excepted to the verdict and gave notice of motion for a new trial.

The jurors were then excused by the Court.

Upon request of Mr. Hoddick, bond was increased to \$2,500.00, to be posted by 4 p.m., January 13, 1950.

The Court ordered that this case be continued to January 26, 1950, at 10 a.m., for pre-sentence investigation and sentence.

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[Title of District Court and Cause.]

#### MOTION FOR A NEW TRIAL

Comes now defendant, Winston Churchill Henry, by his attorneys, Landau & Fairbanks and O. P. Soares, and respectfully moves the above-entitled Court for a new trial upon the grounds:

1. That the verdict rendered in said cause on January 12, 1950, is contrary to the law, contrary

to the evidence, and contrary to the weight of the evidence.

2. That there was no proof amounting to more than a mere scintilla of evidence and no proof beyond a reasonable doubt that the defendant committed the offenses alleged in the indictment and that the jury in rendering the verdict of guilty was in error.

3. That the Court erred in failing to grant defendant's motions for directed verdicts as to Counts I and II and both Counts generally for the reasons heretofore stated in the record and by reference made a part hereof.

4. That the Court erred in denying the motion to strike the testimony of witnesses relating to the acts of and conversations with the defendant that were incriminatory in nature for the reason that at the time of the search and investigation thereafter the defendant was then under an illegal arrest, and there could be no presumption that his acts and words were free and voluntary, but on the contrary the presumption was that the defendant was under duress and compulsion.

5. That the Court erred in denying the motion to strike the testimony of Officer Kinney with reference to his testimony about a conversation between the witness and the defendant at the vice squad room on July 16, 1949, at or about 4:45 p.m., wherein the defendant was alleged to have stated that he was responsible for everything at 803 Haus-

ten Street, for the reason that, as the witness testified, he was then conducting an investigation concerning certain guns and the questions put to the defendant and the defendant's answers thereto related specifically to these guns and hence could have no possible bearing on or admissible as an admission in this case or to any matter which was not then under investigation by the witness.

6. That the Court erred in denying the motion to strike the testimony of the witness, H. A. Patterson, concerning the making of a demand of the defendant for the production of certain forms on September 27, 1949, and giving him until September 30, 1949, to produce them for the reason that the demand was made after the indictment was returned against the defendant by the grand jury, and even though the witness may not have known that an indictment had in fact been previously brought against the defendant the said demand was made at the request of and in the presence of Mr. Wells, the Acting Narcotic Chief in the Territory of Hawaii, who knew that the indictment had been returned; for the further reason that at the trial of the case the only evidence of the nonpayment of the tax was the witness's testimony which was not and could not have been available to the grand jury and, therefore, at the time of the indictment there was no evidence of any violation of the law; and further that the time given by the witness to the defendant to produce the forms was not reasonable under the circumstances and

the demand, having come after the return of the indictment, was, in effect, requiring the defendant to give testimony against himself; and for the further reason that the evidence was silent as to any information given to the defendant by the witness as to the law and the requirement thereof that such form must be produced upon request or the effect of such failure to produce the forms.

7. That the only evidence of possession which was introduced by the United States were the alleged admissions, by word or by acts, of the defendant that he was in possession directly or constructively; that this in effect permitted the proof of the *corpus delicti* by the alleged admissions of the defendant; that the *corpus delicti* should have been proven by evidence outside and beyond the alleged admissions.

8. That the Court erred in refusing to give the defendant's requested instructions Nos. 1, 2, 3, 6 and 8, and the giving of the Government's instructions Nos. 9 and 10 for the reasons heretofore stated in the record and by reference made a part hereof.

9. That the Court erred in discussing and telling the jury during its deliberations what the Government relied upon and what the defendant relied upon as a defense when the jury merely requested instructions as to the law and not comment or argument on the evidence.

10. That the Court erred in making any comments or discussions on the evidence while the jury was in deliberation on the facts.

11. That the Court erred in giving the statement of law as to possession which referred only to civil possession and not possession as used in the criminal statute, and that the examples given by the Court to the jury on the question of what constituted possession were ambiguous and misleading.

12. That the Court erred in commenting upon the evidence while the jury was in deliberation for the further reason that the said comments were not full and fair but were in fact ambiguous, misleading and argumentative, and the use of the blackboard in the manner in which it was used by the Court in setting up the various elements of the Government's case and then setting up four elements, only one of which was evidential in nature on the defense, could have no result but to show to the jury that in the Court's mind the evidence of the Government was overwhelming.

13. That the Court erred in denying the defendant's motion for a mistrial for the reason that the article in the Honolulu Advertiser of Sunday, January 8, 1950, directly linked the defendant up with another alleged narcotic violation and had been in fact read by at least one juror.

Dated: Honolulu, T. H., this 21st day of January, 1950.

WINSTON CHURCHILL  
HENRY,  
Defendant.

By LANDAU & FAIRBANKS and  
O. P. SOARES,  
His Attorneys.

By /s/ SAMUEL LANDAU.

Service of Copy admitted.

[Endorsed]: Filed January 23, 1950.

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District Court of the United States  
for the District of Hawaii

No. 10,253

UNITED STATES OF AMERICA

vs.

WINSTON CHURCHILL HENRY

JUDGMENT AND COMMITMENT

On this 26th day of January, 1950, came the attorney for the Government and the defendant appeared in person and by counsel; Samuel Landau, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of

guilty by the jury, of the offense of knowingly, wilfully, unlawfully and feloniously purchasing a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package, and knowingly, wilfully, unlawfully and feloniously acquiring and otherwise obtaining a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes without having paid tax as charged in Counts I and II of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

Count I—Four (4) years and to pay a fine of \$1,000.00;

Count II—Two (2) years and to pay a fine of \$1,000.00;

Sentences of imprisonment to run consecutively;

Defendant is to be further imprisoned until payment of the fines, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified

copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ **J. FRANK McLAUGHLIN,**  
United States District Judge.

By /s/ **WM. F. THOMPSON, JR.,**  
Clerk.

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[Title of Court and Cause.]

### MINUTE ORDER

Thursday, January 26, 1950

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came Mr. Samuel M. Landau, counsel for the defendant herein. This case was called for hearing on motion for new trial.

Following argument by respective counsel, motion for new trial was denied by the Court. Exceptions were allowed the defendant.

At 2:12 p.m., there being present Mr. Hoddick and the defendant with Mr. Landau, his counsel, this case was called for sentence.

Upon request of Mr. Landau, the Court allowed the defendant and his counsel to read the presentence report.

Upon the verdict of guilty, the Court adjudged the defendant guilty as charged in the Indictment and ordered the defendant committed to the custody

of the Attorney General for placement for a period of Four Years and to pay a fine of \$1,000.00, as to Count I, and for a period of Two Years and to pay a fine of \$1,000.00 as to Count II of the Indictment, sentences of imprisonment to run consecutively and in default of payment of fine to stand committed until otherwise discharged.

Mr. Landau gave notice of appeal and requested that the defendant be released pending the filing of a supersedeas bond.

Upon further request of Mr. Landau, the Court ordered mittimus stayed to 12, January 27, 1950, with the consent of the bondsman.

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#### INSTRUCTION No. 4

You are instructed that as to Count I the defendant is charged with knowingly, wilfully, unlawfully and feloniously purchasing a salt, compound and derivative of opium, and the Government must prove beyond all reasonable doubt all of the material allegations in said Count. Those material allegations are: A—admitted items in evidence are narcotics. (1) that the items mentioned in the Count were not at the time of the purchase in the original stamped package and further that they were not from the original stamped package; (2) that the defendant did in fact purchase on or about July 16, 1949, the items listed in Count I. If you have a reasonable doubt as to any of the above material

allegations, you must acquit the defendant as to Count I.

Given.

/s/ J. F. Mc.

Operation of presumption of guilt under statute arising from fact of unexplained possession.

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#### INSTRUCTION No. 5

You are instructed that as to the charge in Count I the statute states in effect that the "absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found." This means that before this theory can be considered by you, you must first find beyond all reasonable doubt that there was an absence of appropriate tax-paid stamps and, secondly, that the defendant was in possession of them at the time that they were found. If you have a reasonable doubt as to either of these matters, you must acquit the defendant for the reason that there is no evidence of a direct purchase by the defendant.

Given.

/s/ J. F. Mc.

## INSTRUCTION No. 7

You are instructed that as to Count II the defendant is charged with being a transferee required to pay the tax imposed by law and acquiring and otherwise obtaining the articles mentioned therein without having paid such tax, and the Government must prove beyond all reasonable doubt that the defendant was in fact a transferee of the articles mentioned therein and was, therefore, required to pay the transfer tax. If you have a reasonable doubt as to the allegation that he was a transferee, you must acquit the defendant.

Given.

/s/ J. F Mc.

(Plus inst. re presumption.)

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## INSTRUCTION No. 8

You are instructed, gentlemen of the jury, that a person under arrest has a constitutional privilege not to make any statements and his failure to make a statement cannot be considered by you as evidence in arriving at your verdict, nor can his silence or lack of denial of an accusation made to him or in his presence be considered by you in any manner in arriving at a verdict against him.

Given.

/s/ J. F Mc.

## INSTRUCTION No. 9

Possession means control of a thing to the exclusion of any other person having no better claim to it. In other words, before you can arrive at a decision with reference to the fact of possession beyond all reasonable doubt, you must find either that the defendant was in physical and actual possession of the articles mentioned in the indictment or that the evidence shows directly or indirectly that those articles belonged to him or that they were on the premises within the exclusive ultimate control of the defendant. If you have any reasonable doubt as to this situation or if you have any reasonable doubt that the premises in which these articles were found were in the exclusive ultimate control of the defendant, you must acquit him of the charges. In connection with the question of possession, mere knowledge of the whereabouts of the articles or the knowledge of their contents or recognition of their contents after they have been found is not sufficient to base a finding of possession.

Given.

/s/ J. F Mc.

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## INSTRUCTION No. 10

The indictment in this case is a mere accusation and is not of itself any evidence, not the slightest, of the defendant's guilt, and no juror should permit himself to be to any extent influenced because

or on account of the indictment against the defendant.

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. He is not required to put in any evidence at all upon the subject. The burden of proof is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.

Given.

/s/ J. F. Mc.

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#### INSTRUCTION No. 11

The defendant has entered a plea of not guilty to the charges in this case, and such plea puts in issue the allegations contained in the indictment and requires the Government to prove such allegations to your satisfaction beyond all reasonable doubt before a verdict of guilty can be returned against the defendant.

Given.

/s/ J. F. Mc.

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#### INSTRUCTION No. 12

You are further instructed that the defendant is presumed to be innocent of the charge filed against him until he is proven guilty beyond a reasonable

doubt by the evidence. A defendant is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering the testimony in the case, you must look at such testimony and view it in the light of that presumption of innocence with which the law clothes the defendant, and you must remember that it is a presumption that abides with him throughout the case until the evidence convinces you to the contrary beyond all reasonable doubt.

Given.

/s/ J. F. Mc.

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#### DEFENDANT'S INSTRUCTION No. 13

I instruct you, gentlemen of the jury, that in criminal cases, even when the evidence is so strong that it demonstrates the probability of the guilt of the party accused as set forth in the indictment, still if it fails to establish beyond a reasonable doubt the guilt of the defendant in the manner and form as charged, then it is the duty of the jury to acquit the defendant and bring in a verdict of not guilty.

I further instruct you that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chances, it is more probable that the defendant is guilty. To warrant a conviction of the defendant he must be proved to be guilty beyond all reasonable doubt

when all the evidence of the case is considered together.

Given.

/s/ J. F. Mc.

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#### INSTRUCTION No. 14

The jury are further instructed that the presumption of innocence is not a mere form, to be cast aside by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces you of his guilt as charged beyond all reasonable doubt.

Given.

/s/ J. F. Mc.

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#### INSTRUCTION No. 15

Under the law, no jury should convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can be convicted of crime is not suspicion, not mere probabilities, but proof which excludes all reasonable doubt of his innocence.

Given.

/s/ J. F. Mc.

## INSTRUCTION No. 16

A reasonable doubt may arise from the evidence or it may arise from the lack of evidence. It is such a doubt as would cause you, as reasonable men, to hesitate to act upon it in matters of importance to you.

It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge or the occurrence of a particular event, or the existence of a thing. It is a matter that may be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the court, you are not satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you will return a verdict of acquittal.

Given.

/s/ J. F. Mc.

## INSTRUCTION No. 19

You are instructed that under the law the defendant is not compelled to testify in his own behalf. He is presumed to be innocent until he is proven guilty beyond a reasonable doubt. The burden of proving him guilty is upon the United States.

And the fact that the defendant has not testified in his own behalf shall not be considered by you in determining the question of his guilt or innocence.

Given.

/s/ J. F. Mc.

Burden of going forward with evidence doesn't mean he has to himself.

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#### DEFENDANT'S INSTRUCTION No. 3a

I instruct you, gentlemen of the jury, that one accused of crime cannot be convicted unless the evidence excludes every reasonable hypothesis of innocence of the crime charged. And, in this case, if, from all the evidence, you should find that the defendant's guilt is not established beyond a reasonable doubt, you must find him not guilty even though you should believe that the evidence points with equal force to his guilt.

Otherwise stated, the rule of law is that if two reasonable constructions can be placed on the evidence, one of which is consistent with defendant's innocence of the crime charged or even leaves a reasonable doubt in your minds as to his guilt even though the other is equally consistent with his guilt, you still must find him not guilty.

This is a humanitarian provision of law which is not to be lightly regarded by you, and you must keep it in mind at all times and give the defendant the benefit of it.

Given.

/s/ J. F. Mc.

## DEFENDANT'S INSTRUCTION No. 21

The unanimous agreement of the jury is necessary to a verdict. This is in nowise to be considered by you as a justification for abandoning your individual convictions or beliefs or doubts. While a unanimous verdict is required it must be arrived at by each juror's voting as he believes the law and the evidence justifies him to vote. While, of course, each of you must give due regard to the opinions of the others, you are not required to substitute the opinion of a fellow juror for your own simply for the purpose of arriving at a unanimous verdict.

To illustrate, if after full and fair deliberation, one or more of you believe from the law and the evidence that the guilt of the defendant is established so clearly and convincingly as to leave no reasonable doubt in your minds, you are not to vote "not guilty" merely because a majority of the jury does not believe the defendant guilty or has a reasonable doubt of his guilt. So, too, if one or more of you, after a fair and impartial discussion with your fellow jurors, are not convinced from the evidence and the law beyond a reasonable doubt that defendant has been proved to be guilty of the crime charged, you are not to vote "guilty" merely because a majority votes that way. The "unanimous" verdict of the jury must be the sum total of your individual beliefs and is not to be arrived at by an arrangement of mere compromise.

Given.

/s/ J. F. Mc.

## UNITED STATES INSTRUCTION No. II

Evidence is of the least two kinds; namely, direct and positive and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. Circumstantial evidence is proof of such facts and circumstances surrounding a crime from which a jury may infer others and connected facts which usually or reasonably follow according to the common experience of mankind.

Circumstantial evidence is regular and competent in a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same weight as direct evidence. Circumstantial evidence in any sense would have to be considered by you in connection with other evidence produced. But, to be of value, the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.

Given.

/s/ J. F. Mc.

## UNITED STATES INSTRUCTION No. VI

To support a conviction of the Defendant on the charges contained in the Indictment, you must be convinced beyond a reasonable doubt that the Defendant had possession of the narcotics described in the Indictment.

That possession must have been conscious and it may have been either actual and physical or it may have been constructive. In determining whether the Defendant had conscious possession, either physical or constructive, of the narcotics, you are instructed that possession generally means the holding or retaining of property in one's control and that one has possession of personal property when it is under his dominion and subject to his control. This means that the possessor must have had the power to exclude others having no better claim thereto from exercising dominion and control over the property. Possession once acquired may be preserved by the mere intention of the possessor, and in the absence of actual or physical possession if the possessor still intends to retain control and dominion over the property or legal title to the subject property, he is deemed to have constructive possession of that property.

50 C.S. 781.

Given as amended.

/s/ J. F. Mc.

## UNITED STATES INSTRUCTION No. VII

In the first count of the Indictment the Defendant is charged with the unlawful purchase of cocaine and heroin. The statute defining this alleged crime makes unexplained possession of heroin and/or cocaine, and the absence of appropriate tax-paid stamps therefrom *prima facie* evidence of their unlawful purchase. With this statutory presumption, it is not necessary that the Government introduce any evidence relating directly to the purchase if the Government has satisfied you beyond a reasonable doubt, by the evidence which it did adduce, that the Defendant had conscious possession of the heroin and cocaine described in count one of the Indictment and of that possession there has been no satisfactory explanation by the defense.

This means that if you are convinced beyond a reasonable doubt that the Defendant had in his conscious possession, on or about July 16, 1949, heroin and cocaine to which the appropriate tax-paid stamps were not affixed, you must find the Defendant guilty of the offense charged in the first count of the Indictment.

Given.

/s/ J. F. Mc.

## UNITED STATES INSTRUCTION No. VIII

In the second count of the Indictment the Defendant is charged with the unlawful acquisition of marihuana. The statute defining this alleged crime

makes the possession of marihuana, coupled with a failure by the Defendant to produce certain required order forms after reasonable notice and demand, presumptive evidence of the unlawful acquisition and obtention. With this presumption, if you are convinced beyond a reasonable doubt that the Defendant had conscious possession of marihuana on or about July 16, 1949, and that he failed to produce the required order forms after reasonable notice and demand, it is not necessary that the Government introduce evidence bearing directly on how, when and where he acquired the marihuana.

This means that if you are convinced beyond a reasonable doubt that the Defendant had in his conscious possession marihuana, and that he failed to produce the required order forms after reasonable notice and demand, that you must find the Defendant guilty as to the second count of the Indictment.

Casey vs. U. S., 276, U. S. 413 (1928).

Yee Hem vs. U. S. 268, U. S. 178 (1924).

“Wigmore on Evidence,” Third Edition, Volume IV, p. 724, Section 1356.

Given.

/s/ J. F. Mc.

## UNITED STATES INSTRUCTION No. IX

With respect to the quantity of heroin and cocaine alleged in count I it is not incumbent upon the government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence that the Defendant had in his conscious possession 915 capsules of heroin and any quantity of cocaine, less than 250 grains, that is sufficient to support a verdict of guilty as to the first count of the Indictment.

Cromer v. U. S., 142 Fed. 2d, 697 (1944).

Given as amended.

/s/ J. F. Mc.

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## UNITED STATES INSTRUCTION No. X

With respect to the quantity of marihuana alleged in count II it is not incumbent on Government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence that the Defendant unlawfully acquired or obtained a lesser quantity of marihuana cigarettes and a lesser quantity of bulk marihuana, that is sufficient to support a verdict of guilty as to the second count of the Indictment.

Cromer v. U. S., 142 Fed. 2d, 697 (1944).

Given as amended.

/s/ J. F. Mc.

## UNITED STATES INSTRUCTION No. XI

You are instructed that in arriving at your verdict you may consider free and voluntary admissions if any made by the Defendant and free voluntary acts of the Defendant performed if any while he was under arrest.

Given.

/s/ J. F. Mc.

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## INSTRUCTION No. 1

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count I.

Denied.

/s/ J. F. Mc.

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## INSTRUCTION No. 2

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count II.

Denied.

/s/ J. F. Mc.

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## INSTRUCTION No. 3

If, upon a fair and impartial consideration of all the evidence on any fact or issue in this case, the jury finds that there are two reasonable theories concerning such fact or issue supported by the testimony in the case, and that one of such theories

is consistent with a theory tending to show that the defendant is guilty as charged in the indictment, and the other is consistent with a theory tending to show the innocence of the defendant, and both of said theories are equally convincing in your minds, it is your duty to resolve such fact or issue in favor of the defendant.

Denied.

/s/ J. F. Mc.

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#### INSTRUCTION No. 6

You are instructed that even should you find that there was no tax-paid stamps on the drugs and they were in fact in the possession of the defendant at the time they were found, that does not necessarily mean that the defendant did in fact purchase those articles, since common experience does not support such a presumption. Mere possession of such articles is not a crime under our law. Therefore, unless you find from the evidence beyond all reasonable doubt that the defendant did in fact purchase the articles listed in Count I, you must acquit him as to Count I.

Denied.

/s/ J. F. Mc.

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#### INSTRUCTION No. 8

You are instructed that mere proof that the defendant may have had such articles in his possession

is not sufficient standing by itself for you to arrive at a verdict of guilty, and unless you also find beyond all reasonable doubt that the defendant was in fact a transferee required to pay the tax, you must acquit the defendant as to Count II.

Denied as incomplete.

/s/ J. F. Mc.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

#### Offenses:

Count I: Unlawful purchase of a derivative of opium, to wit, 946 capsules, each containing heroin and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, U.S.C.

Count II: Being a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, U.S.C., did unlawfully acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes, without having paid such tax, in violation of Section 2593, Title 26, U.S.C.

Concise statement of judgment or order, giving date and any sentence:

On January 26, 1950, after a trial by jury on a plea of not guilty by the defendant, a judgment

was entered pursuant to a verdict of guilty found by the jury in the above-entitled case on January 12, 1950. The defendant was found guilty of the offenses as charged, judgment being entered accordingly, and the defendant above named was sentenced, as to Count I, to be confined in prison for a term of four (4) years and to pay a fine of \$1,000.00, and as to Count II to be confined in prison for a term of two (2) years and to pay a fine of \$1,000.00, both sentences to run consecutively. Bail for the defendant, having been previously set in the amount of \$2,500.00, was ordered continued for ten (10) days from the judgment of the above-entitled Court pending possible appeal.

I, Winston Churchill Henry, the above defendant and appellant, by my attorneys, Landau & Fairbanks and O. P. Soares, hereby give notice of appeal and do hereby appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from the above-stated judgment.

Dated: Honolulu, T. H., this 2nd day of February, 1950.

WINSTON CHURCHILL  
HENRY,  
Defendant.

By LANDAU & FAIRBANKS and  
O. P. SOARES,  
His Attorneys.

By /s/ SAMUEL LANDAU.

[Endorsed]: Filed Feb. 3, 1950.

[Title of District Court and Cause.]

### ELECTION OF DEFENDANT

Judgment in the above-entitled action having been rendered on January 26, 1950, the defendant having been sentenced to serve in prison for a term of six (6) years, and an appeal having been noted in the above-entitled action on February 3rd, 1950, the defendant hereby declares that he does elect not to commence service of the sentence.

Dated: Honolulu, T. H., this 2 day of February, 1950.

/s/ WINSTON CHURCHILL  
HENRY,  
Defendant.

By LANDAU & FAIRBANKS and  
O. P. SOARES,  
His Attorneys.

By /s/ SAMUEL LANDAU.

[Endorsed]: Filed Feb. 6, 1950.

[Title of District Court and Cause.]

COST BOND

Winston Churchill Henry, appellant herein, and Leonard K. M. Fong, surety, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves and each of them, their and each of their heirs, executors and administrators, successors and assigns, to make good all taxable costs and charges not exceeding the sum of Two Hundred Fifty Dollars (\$250.00) that the appellees may be put to or allowed if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified.

The said surety hereby irrevocably appoints the Clerk of this Court as his agent upon whom any papers affecting his liability on this undertaking may be served.

Signed, sealed and delivered this 3rd day of February, 1950.

/s/ WINSTON CHURCHILL  
HENRY.

/s/ LEONARD K. M. FONG.

Approved:

/s/ RAY J. O'BRIEN,  
United States Attorney.

Territory of Hawaii,  
City and County of Honolulu—ss.

Leonard K. M. Fong, being first duly sworn, on oath deposes and says that he is the Leonard K. M. Fong named as a surety and who filed the foregoing Bond and that he is worth the sum of Two Hundred Fifty Dollars (\$250.00) over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LEONARD K. M. FONG.

Subscribed and sworn to before me this 6th day of Feb., 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of Hawaii.

[Endorsed]: Filed Feb. 6, 1950.

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[Title of District Court and Cause.]

BOND

Know All Men By These Presents:

That we, Winston Churchill Henry, as principal, and Fong Hing and Leonard K. M. Fong, as sureties, are held and firmly bound unto the United States of America in the full sum of \$4,500.00 for the payment of which well and truly to be made we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately in the United States District

Court in and for the District and Territory of Hawaii judgment and sentence were made and entered against Winston Churchill Henry, defendant above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to secure a reversal of said judgment and sentence, and

Whereas, the Honorable J. Frank McLaughlin, Judge of said District Court, did regularly order that a supersedeas and bail bond be given in the sum of \$4,500.00 pending said appeal.

Now, Therefore, the condition of the above obligation is such that if the said Winston Churchill Henry shall appear here in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against him shall be reversed by said

Circuit Court, and if he shall not leave the territorial jurisdiction of the City and County of Honolulu, Territory of Hawaii, without first obtaining the permission of the Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden principal and sureties have hereunto affixed their hands this 14th day of February, 1950.

/s/ WINSTON CHURCHILL  
HENRY,  
Principal.

/s/ FONG HING,  
Surety.

/s/ LEONARD K. M. FONG,  
Surety.

Taken and acknowledged before me this 14th day of February, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,  
Clerk, United States  
District Court.

Territory of Hawaii,  
City and County of Honolulu—ss.

Fong Hing, being first duly sworn, on oath deposes and says that he is the Fong Hing named as a surety and who filed the foregoing Bond and that he is worth the sum of \$9,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ FONG HING.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, Territory of Hawaii.

Territory of Hawaii,  
City and County of Honolulu—ss.

Leonard K. M. Fong, being first duly sworn, on oath deposes and says that he is the Leonard K. M. Fong named as a surety and who filed the foregoing Bond and that he is worth the sum of \$9,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LEONARD K. M. FONG.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, Territory of Hawaii.

Approved as to Form:

/s/ RAY J. O'BRIEN,  
United States Attorney.

Approved as to the amount and sufficiency of surety.

/s/ J. FRANK McLAUGHLIN,  
Judge, U. S. District Court.

[Endorsed]: Filed Feb. 14, 1950.

[Title of District Court and Cause.]

### AMENDED DESIGNATION OF RECORD ON APPEAL

In making up the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, you will please include the following:

1. Indictment filed September 15, 1949.
2. Motion for Bill of Particulars filed September 27, 1949, together with Affidavit thereon.
3. Motion to Transfer Case from the District of Hawaii and Affidavit filed October 26, 1949.
4. Clerk's Minutes of September 28; October 5, 7; November 1, 9, 10, 1949; January 4, 5, 6, 9, 10, 11 and 12, 1950.
5. Defendant's Requested Instructions 1, 2, 3, 6 and 8 which were refused by the Court and Government's Instructions 9 and 10 given by the Court over objection of Defendant.
6. Official Reporter's Transcript of Evidence taken and proceedings had during the argument on the Motion for Bill of Particulars and the Motion to Transfer Case from the District of Hawaii and during the trial, including all statements made by the Court to the jury during the deliberation of the jury.
7. Exhibits introduced by Defendant during hearing on Motion to Transfer Case from the District of Hawaii.

8. Motion for New Trial filed January 23, 1950.
9. Clerk's Minutes of January 26, 1950.
10. Official Reporter's Transcript of Testimony taken on January 26, 1950, during argument on the Motion for New Trial and the actual Sentence of the Court and exception thereto.
11. Judgment of Sentence of the Court.
12. Notice of Appeal filed February 3, 1950.
13. Election of Defendant filed February 3, 1950.
14. Bond filed February 3, 1950.
15. Cost Bond filed February 3, 1950.
16. This Amended Designation of Record on Appeal filed April 14, 1950.

Dated: Honolulu, T. H., April 14, 1950.

WINSTON CHURCHILL  
HENRY,  
Defendant.

By LANDAU & FAIRBANKS and  
O. P. SOARES,  
His Attorneys.

By /s/ SAMUEL LANDAU.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

In making up the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, please include the following:

1. All instructions given by the Court.
2. This Designation of Record on Appeal filed April 25, 1950.

Dated: Honolulu, T. H., this 24th day of April, 1950.

RAY J. O'BRIEN,  
United States Attorney,  
District of Hawaii.

By /s/ HOWARD K. HODDICK,  
Asst. United States Attorney,  
District of Hawaii.

[Endorsed]: Filed April 25, 1950.

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[Title of District Court and Cause.]

### AMENDED DESIGNATION OF RECORD ON APPEAL

In making up the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled Cause, please include in addition to the items speci-

fied in the Designation of Record on Appeal filed by the Plaintiff on April 25, 1950, the following:

1. Affidavit and search warrant.
2. This Amended Designation of Record on Appeal.

Dated: Honolulu, T. H., this 25th day of April, 1950.

RAY J. O'BRIEN,  
United States Attorney,  
District of Hawaii.

By /s/ HOWARD K. HODDICK,  
Asst. United States Attorney,  
District of Hawaii.

Service admitted.

[Endorsed]: Filed April 25, 1950.

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#### AFFIDAVIT FOR SEARCH WARRANT

(Internal Revenue Form)

United States of America,  
District of Hawaii—ss:

On this 12th day of July, A.D. 1949, before me, Harry Steiner, a United States Commissioner in and for the District of Hawaii, personally appeared Gerry Wilson, who being duly sworn, deposes and says:

That she has good reason to believe and does believe that in and upon certain premises within the

District of Hawaii, to wit, the premises known as: and particularly described as follows: in a two story stucco building located at 803 Hausten Street, Honolulu, T. H., said two story stucco building is painted white with green awning and is the second building in the rear of 803 Hausten Street, Honolulu, T. H., there have been and are now located and concealed and sold certain property used as the means of committing a fraud upon the revenue of the United States, to wit:

Heroin in violation of Internal Revenue Code, Sections 2553(a) and 2593(a).

That the facts tending to establish the grounds of this application and the probable cause of affiants believing that such facts exist, are as follows:

That the Affiant, Gerry Wilson, on July 7, 1949, visited the above-described premises and purchased one (1) capsule of Heroin from a negro man known to her as Winston Churchill Henry, alias Frisco Shorty, who lives on said premises. The Affiant, Gerry Wilson, further states that she had purchased Heroin on very many occasions from May to July, 1949, inclusive, from Winston Churchill Henry in said premises. From the Affiant's observation, she finds that these premises are a place where Heroin is kept for sale and replenished as needed. Affiant has seen said Winston Churchill Henry replenish his supply of Heroin from said premises as needed when said Winston Churchill Henry does not have Heroin on his person and said Affiant has also on very numerous occasions seen Winston Churchill

Henry produce Heroin for sale from his own person.

Wherefore, your affiant prays that a Search Warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

/s/ GERRY WILSON.

Sworn to and subscribed before me, this 12th day of July, 1949.

[Seal]      /s/ H. STEINER,  
                    United States Commissioner,  
                    District of Hawaii.

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[Title of District Court and Cause.]

### SEARCH WARRANT

To William K. Wells, Acting District Supervisor,  
Bureau of Narcotics:

Affidavit having been made before me by Gerry Wilson that she is positive that on the premises known as In a two story stucco building located at 803 Hausten Street, Honolulu, T. H., said two story stucco building is painted white with green awning and is the second building in the rear of 803 Hausten Street, Honolulu, T. H., in Honolulu, District of Hawaii, there is now being concealed and sold certain property, namely Heroin, in violation of Internal Revenue Code, Sections 2553(a) and 2593(a).

That the Affiant, Gerry Wilson, on July 7, 1949, visited the above-described premises and purchased one (1) capsule of Heroin from a negro man known to her as Winston Churchill Henry, alias Frisco Shorty, who lives on said premises. The Affiant, Gerry Wilson, further states that she had purchased Heroin on very many occasions from May to July, 1949, inclusive, from Winston Churchill Henry in said premises. From the Affiant's observation, she finds that these premises are a place where Heroin is kept for sale and replenished as needed. Affiant has seen said Winston Churchill Henry replenish his supply of Heroin from said premises as needed when said Winston Churchill Henry does not have Heroin on his person and said Affiant has also on very numerous occasions seen Winston Churchill Henry produce Heroin for sale from his own person, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (person) (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search (at any time in the day or night) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this

warrant and bring the property before me within ten days of this date, as required by law.

Dated this 12th day of July, 1949.

[Seal] /s/ HARRY STEINER,  
U. S. Commissioner.

### RETURN

I received the attached search warrant July 12, 1949, and have executed it as follows:

On July 16, 1949, at 12:40 o'clock p.m., I searched ~~(the person)~~ (the premises) described in the warrant and

I left a copy of the warrant with Winston Churchill Henry together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1—Air mail envelope containing 29 capsules suspected to be heroin.

1—paper bindle containing 2 capsules suspected to be heroin.

1—Ovaltine bottle containing 915 capsules suspected to be heroin.

1—Bottle containing approx. 200 grs. of cocaine.

1—Paper bag containing approx. 2 ounces marihuana in bulk.

1—New Drene shampoo box containing 29 suspected marihuana cigarettes.

6—Suspected marihuana cigarettes.

129 Empty gelatin capsules No. 5 in a box.

275 Empty gelatin capsules No. 5 in a manila paper.

This inventory was made in the presence of  
Winston Churchill Henry and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ WILLIAM K. WELLS.

Subscribed and sworn to and returned before me  
this 18 day of July, 1949.

[Seal] /s/ HARRY STEINER,  
United States Commissioner.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings, transcripts of proceedings, exhibits, and instructions:

## Indictment.

### Motion for Bill of Particulars and Affidavit.

Motion to Transfer Case from the District of Hawaii, Notice and Affidavit.

### Motion for a New Trial.

## Judgment and Commitment.

### Notice of Appeal.

Election of Defendant.

Cost Bond.

Bond (supersedeas).

Stipulation Extending Time to File Transcript of Record and Order.

Amended Designation of Record on Appeal (Appellant).

Designation of Record on Appeal (Appellee).

Amended Designation of Record on Appeal (Appellee).

Transcript of Proceedings—September 28 and October 7, 1949.

Transcript of Proceedings—November 1, 9 and 10, 1949.

Transcript of Proceedings—January 4, 5, 6, 9, 10, 11, 12 and 26, 1950.

Defendant's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9, admitted in hearing on motion to transfer case from the District of Hawaii.

Instructions Given.

Instructions Denied—Defendant's Nos. 1, 2, 3, 6 and 8.

Affidavit and Search Warrant.

I further certify that included in said record on appeal is a copy of the court minutes of September 28, October 5, 7, November 1, 9 and 10, 1949; January 4, 5, 6, 9, 10, 11, 12 and 26, 1950.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of April, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,

Clerk, U. S. District Court,  
District of Hawaii.

In the United States District Court for the  
Territory of Hawaii

Criminal Nos. 10,253—10,254—10,256

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant.

Before: Hon. Delbert E. Metzger,  
Judge.

Appearances:

HOWARD K. HODDICK, ESQ.,  
Assistant U. S. Attorney,  
Appearing for Plaintiff;

SAMUEL LANDAU, ESQ.,  
Appearing for Defendant;

KATSURO MIHO, ESQ.,  
Appearing for Defendant in Criminal No.  
10,256.

### PROCEEDINGS

The Clerk: Criminal No. 10,253, United States of America versus Winston Churchill Henry; case called for hearing on motion for bill of particulars.

Mr. Landau: If the Court pleases, the motion for a bill of particulars is as to both counts of the indictment. The first count of the indictment is

that the defendant on or about the 16th of July did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, which was not in a stamped package and was not from the original stamped package. I am asking, if the Court pleases, in this motion for a bill of particulars as to this count the time, place and circumstances of the alleged purchase and the person from whom the defendant is alleged to have purchased the articles mentioned in Count 1. I believe that this particular problem was probably touched upon in a motion for a bill of particulars which was filed in another case in this Court last year, or the early part of this year.

In support of that motion, if the Court pleases, I'd like to call the Court's attention to a Fourth Circuit Court of Appeals case, Ong against United States, at 131 Federal 2nd, 175, where the court went into the question as to whether or not the indictment was in good form. And the court there held,

"The violation was described in general terms . . ." This is a motion to quash.

The Court: When was the date of that?

Mr. Landau: November 6, 1942.

The Court: Yes. Go ahead.

Mr. Landau: The defendant had moved the court to throw out the indictment on the ground of it being vague and indefinite. The court said,

"The violation was described in general terms, it is true . . ."

Mr. Hoddick: Excuse me one minute. The motion was to vacate judgment after conviction.

Mr. Landau: Yes. "The counts of the indictment under which the consecutive terms of imprisonment were imposed were so vague as to be invalid and that, in any event, they charged but one crime."

In other words, they were attacking the indictment, even though it was after the judgment.

"The violation was described in general terms, it is true, without naming the purchaser or person to whom the drugs were delivered, which would have been the better practice; but, if the accused desired more specific information as to the charge against him, his remedy was to ask for a bill of particulars."

And that's what we are doing. In other words, the court [2\*] intimates in that case that if the name of the purchaser is not given, and if we need further information to properly defend this case, we come in by a motion for a bill of particulars; the inference being that had the defendant in that case filed a motion that information would have been given to him.

Now, as to the second count, if the Court pleases, which is with reference to marihuana, he is charged with being a transferee, required to pay the tax, "did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana . . . without having paid such tax."

Now, they have made a conclusion of law that

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\* Page numbering appearing at top of page of original Reporter's Transcript.

the defendant was a transferee. We would like to know, if the Court pleases, in what manner the defendant became a transferee. In other words, we have to file a bill of particulars rather than a motion to quash because, since it is within the terms of the statute, we cannot say that the indictment is bad. But we can and do say that, although it is in the words of the statute, it is not sufficient, doesn't give us sufficient information. And under ordinary rules where there are conclusions of law stated in the indictment without any facts to bear them out, in our district court, the Territorial court, that is attackable by a demurrer. No demurrer is available in the Federal Court; and under the rules—and cases have been cited—since the rules of criminal [3] procedure have been changed, our only recourse to attack that is by a bill of particulars.

So we want to know what facts do they rely upon, what do they state, upon which they conclude that the defendant was a transferee required to pay the tax. We also want to know the time, the place, and the circumstances under which he did become a transferee. I imagine, though, those two could be linked up into one, and an answer to either one would probably be an answer to the other.

It also says, if the Court pleases, that he unlawfully acquired and otherwise obtained. We'd like to know when he acquired this. We may find that from their answer—and I cannot tell at the moment—that the time of acquisition may have been

the same time that they allege and the same manner that they allege that he became a transferee. They also say that he acquired and otherwise obtained, which makes it a little vague and confusing to us. There is no judicial decision that I can find as to what "acquired and otherwise obtained" is. My understanding of acquisition is one thing but "otherwise obtained" makes it very broad and very vague. We want to know what the Government relies upon. What is it that they say that he acquired, and if so, how did he acquire it? Did he obtain them otherwise? What does "otherwise obtain" them mean?

Mr. Hoddick: May it please the Court, I would like to [4] point out that Section 2553, which defines the offense with which the defendants are charged, the defendant is charged, Count 1 of the indictment, makes it unlawful for any person to purchase, sell, dispense or distribute any narcotics except in the original stamped package or from the original stamped package. Now, in the first case and the only case which Mr. Landau has cited, Ong versus the United States, the defendant was charged with having purchased, sold and dispensed; and it is perfectly proper as it was when Mr. Landau filed a similar motion for a bill of particulars in an earlier case, to want to know whether the defendant is being, whether the defendant is going to be shown to have purchased or to have sold the narcotic drugs. And in this case we have simply charged the defendant with the purchase. The same

statute makes the possession of the narcotics drugs, when they are not in the original stamped package or from the original stamped package, *prima facie* evidence of a violation of this subsection. In other words, the defendant in this case is found in the possession of the drugs, and that is *prima facie* evidence that there was an unlawful purchase. That's all we are charging the defendant with. How he obtained them, from whom he obtained them, is a matter which is peculiarly within his own knowledge. And an old case but a rule which I think has been followed throughout the rules as to motions for bills of particulars [5] in civil matters, and which is applicable to criminal matters, is in *United States versus Tilden*, Federal Case No. 16,521, where the court held that where the information asked for in the motion for a bill of particulars was information which would be peculiarly within the knowledge of the defendant and which the plaintiff could not be expected to know or to have, the motion for a bill of particulars should not be granted.

And that is the defense that I would like to make to the motion in this case. How the defendant came in possession of these drugs, I don't know. I am going to have to rely on the presumption in the statute and require the defendant to give a reasonable explanation therefor. That is as to Count 1. As to Count 2, I make the same defense, that is, the motion for a bill of particulars as to Count 2—and I would point out to the Court that there is also a presumption under Section 2593 which defines the violation. There it says,

"... and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by Section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by Section 2590(a)." [6]

Once again you have the question of presumption arising from possession. Certainly nobody is better informed as to how he came into possession of these drugs than the defendant himself. That's all.

Mr. Landau: If the Court pleases, I think Counsel is guilty of a confusion in his mind, and given the benefit of the doubt in that when he says that the defendant knows how he got possession of them—this is a criminal case, if the Court pleases, and this is not a civil case. The presumption of innocence isn't anything that we just talk about and then forget. It is something which is a firm and important matter that remains with the defendant not only in the trial of the merits but in any stage of the case. For Counsel to say that we don't have to give them the information because the defendant knows how he got it places the Government in a position to say, well, the man is guilty so he knows how he got that stuff. The man is innocent, if the Court pleases, until the Court in the jurisdiction finds him guilty. And I submit, if the Court pleases, with that presumption of innocence to refuse to give him the information would

be erroneous on the part of the government. The man says, I don't know anything about it. When he enters a plea of not guilty in this case, it puts in issue every material allegation of the indictment, and that includes the fact that there was narcotics or that he ever had possession of the narcotics; [7] and if he, on his plea of not guilty, denies that he ever had narcotics, how can the Government say, well, he had the narcotics and we don't have to give him the information as to how he got it. They are charging him with the possession, if the Court pleases, and if they are charging him with the possession, with the presumption of innocence it is their duty to tell Counsel and the Defendant and the Court at this time, so that a proper defense can be prepared and a proper pleading entered in this Court, just what it is they rely upon.

Now, in the case which I mentioned some time ago, which Counsel agreed with me, the charge in that case was that he did purchase, sell, dispense and distribute. And in the motion for a bill of particulars the court agreed with me that whatever effect the presumption under the statute might be as to the bill of particulars on the indictment, they had to allege which of those four things they were relying upon, and having determined which of those four things they were relying upon the other necessary information was to come along. And they did change it to "purchase" and they did give us the information from whom I believe the defendant is supposed, or was supposed to have purchased those narcotics.

Now, Counsel, as I say, in his argument indicated to the Court that he is relying purely upon that civil rule, on the theory that the defendant, that the information is in the [8] possession of the defendant. To assume that, if the Court pleases, at this time is to tell the defendant right now that he is guilty. There is no sense going to trial. And we know very well that in this court those rules don't apply. The presumptions, if the Court pleases, which Counsel mentions are presumptions which may arise during the course of a trial but don't alter the fact that we need information and that information is available to us by a bill of particulars.

Mr. Hoddick: May I respond to Counsel?

The Court: What?

Mr. Hoddick: May I respond to Counsel's argument?

The Court: Well, I suppose then he'd want to respond to yours, and so on. The only allegation in the indictment is that on or about the 16th day of July he feloniously purchased the stuff. Now, the time is fixed there in the indictment. As to whom he purchased it from, from whom he purchased the salt, there is no allegation, and I am not convinced that there is any duty on the Government to name the person from whom the indictment was made. It may not be within the knowledge of the Government, the name of the person. But I do think that the defendant is entitled to more particulars than are given here. They ask for the place where he

purchased it. Now, if the indictment stands, the statement rather, the allegation that he did purchase, it certainly is going to be incumbent upon the Government to [9] show not only when but where he purchased it.

Mr. Hoddick: May it please the Court, if I can interrupt your comment for a moment—

The Court: Yes, go ahead.

Mr. Hoddick: —the statute provides that if the Government shows that this man had possession of the drugs, that is sufficient.

The Court: Possession isn't charged here. The charge here is that he purchased.

Mr. Hoddick: Excuse me, your Honor, possession is not the crime. Possession is merely *prima facie* evidence.

The Court: I held that before.

Mr. Hoddick: And if the Government comes in on the trial and is able to show that the defendant had possession of the drugs, that is *prima facie* evidence whether the jury considers it sufficient evidence or not, and it is up to the jury, but whether they consider that the defendant, if he takes the stand and gives a reasonable explanation of how he acquired possession, that is up to the jury; but in this case the place is unknown to the Government as is the person from whom he purchased the drugs. That is why that *prima facie* evidence clause is put there, was put in the statute, and it has been held Constitutional by the courts.

The Court: Well, that could put every person

on trial, every person at home in whose medicine cabinet there are [10] drugs, or any other place.

Mr. Hoddick: That may be, your Honor, but Congress——

The Court: Put them on trial as being a purchaser.

Mr. Hoddick: It is possible to make a lawful purchase of these drugs, and there are order forms provided for.

The Court: It is possible to make a lawful purchase without knowing anything about whether it comes from the original package or where it comes from.

Mr. Hoddick: That might all be brought out on trial, but that is all knowledge that the defendant has.

The Court: Well, somebody put the burden on the defendant——

Mr. Hoddick: No, I don't believe so, your Honor. The Government must carry the burden of proving that the defendant had possession of these drugs. At that stage Congress has said that this is a matter which only the defendant can know about, how he acquired it. We are provided certain means by which we can obtain these drugs, and he knows whether he followed the process which we have laid out. And he is going to have to explain whether he did or did not. The burden is still on the Government. This is not a presumption that the defendant is guilty. It is merely *prima facie* evidence of that guilt. We can't tell whether it is sufficient evidence.

The Court: How does the ordinary citizen who may have [11] this particular drug, or any other narcotic drug, how does the ordinary citizen who has possession of such a drug come into possession? Most often either through a physician or nurse's administration or through a prescription, or he goes to a drug store, sends someone there to make the purchase for him. And that's all he knows about the derivation of the drug, whether it comes out of a registered tax-paid package or where it comes from.

Mr. Hoddick: There is a procedure set out where any transferee of these derivatives of opium and cocaine goes to the Collector of Internal Revenue and he gets a form; if he is a physician or a pharmacist, he pays a very small tax for that order form, and then he is able to purchase the goods. They divide it into a number of different categories. I suppose if he is a wholesaler he pays a lesser tax or a higher tax. And an individual who is getting it under a doctor's prescription for some disease which he may have pays a specified tax. But any other person who is found in the possession of these drugs is presumed to have purchased them unlawfully unless he can produce that order form and the tax stamp thereon. And that, I think, is quite proper. Otherwise we would have no control in this country over the illegal sale and purchase of narcotics. It is too bad that they had to put it in the Internal Revenue Code instead of making it a direct crime, a direct criminal viola-

tion. [12] Apparently that was the way it had to be done. But if your Honor demands that the Government show in this case the place where the defendant got these drugs, and, as I pointed out, he is the only one who knows, then I will have to confess that we will have to ask to nolle prosequi the indictment because we don't have that information. It is certainly no hardship on the defendant to produce those forms or to show that the drugs were given to him by a doctor. And again I point out that this does not overcome the presumption that the defendant is innocent. It doesn't go contrary to that presumption. This is merely, the possession is merely *prima facie* evidence.

Mr. Landau: Well, Counsel wants to wipe out the presumptive innocence.

Mr. Hoddick: I do not.

Mr. Landau: He says the defendant knows where he got it.

Mr. Hoddick: Doesn't he?

Mr. Landau: No, he denies that he had possession of it.

Mr. Hoddick: That will go to the trial of the merits.

Mr. Landau: But you say he has the information, and that doesn't go into—

Mr. Hoddick: We have to prove in the trial that he had possession. If you can prove that he did not, the case collapses. [13]

Mr. Landau: I don't think Counsel is correct in his statement.

Mr. Hoddick: I also would point out that—

Mr. Landau: Just a second. I wish Counsel would address the Court. I submit, if the Court pleases, that the Court's original ruling is absolutely correct in this matter; that any other ruling would indicate that the defendant had possession, and therefore he knows where he got it, and it obviates completely the effect of his plea of not guilty and the presumption that arises and remains with him throughout all the stages of these proceedings.

Mr. Hoddick: I would point out, your Honor, that the rule that I cited at the opening of my argument, that if the defendant has knowledge concerning a subject it is not proper to grant a motion for a bill of particulars. It is not one limited to civil cases. I was quoting from a criminal case decided in the Southern District of New York in connection with income tax violations.

Mr. Landau: How can the Government say that the defendant is peculiarly within that knowledge when he denies that he had possession?

Mr. Hoddick: Then we go to trial on the question of whether he had possession.

Mr. Landau: Then we go to trial without getting the information. [14]

Mr. Hoddick: You have the information right here that he had possession or that he did not. You know that. We charge that he did.

Mr. Landau: We deny that he had possession. We want to know on what you rely.

Mr. Hoddick: I would point out to the Court

that the particulars asked for by the Defendant, it is not in our capacity to furnish. In one case it was decided before this where a motion for a bill of particulars was denied because it was held that that matter was peculiarly within the knowledge of the defendant, and the court instructed the prosecutor that if he should obtain such knowledge before the case came to trial then he should immediately advise the court and the defendant. And I think that is a proper ruling.

The Court: What case was that?

Mr. Hoddick: Your Honor, I haven't made a full note of that. I will have to check over the cases that I read.

The Court: Well, how long ago was it?

Mr. Hoddick: It was in one of the Federal 2nd decisions.

The Court: Oh, I thought you said it was in this Court.

Mr. Hoddick: Oh, no, your Honor, no. That seems to me to be a very reasonable approach to this problem.

Mr. Landau: Counsel first says we will give them the information if we ever have it, and before he says we don't have the information and have no way of ever getting it. [15]

Mr. Hoddick: That is true.

Mr. Landau: That is a peculiar theory upon which to handle this motion, if the Court pleases. In effect what will happen is that the information will not become available to the defendant at any time.

Mr. Hoddick: And we will probably have to go to trial relying on the possession as *prima facie* evidence of the violation. And then I think that it is up to the Court or the jury to determine whether that is sufficient evidence. But I think it is improper to require the Government to come forward now with the information which it obviously does not have, and with information which the defendant obviously does—

Mr. Landau: As the Court well knows, the presumption doesn't make the man guilty. It is one form of proof. It doesn't obviate the necessity of having the information that is in the indictment. The presumption may assist them in proving the allegations of the indictment as properly charged, but it doesn't obviate them from giving that information.

The Court: Well, now, this statute has been on the books for a long time, this statute making it *prima facie* evidence to have possession, *prima facie* evidence of guilt. Well, just what it is, I don't know; it might be purchase; it might be of dispensation, sale. It isn't a fact that the law says merely having possession constitutes a crime. It says *prima facie* evidence of the commission of several of them, several [16] other things that are made unlawful. I would suppose that there would be numerous cases where that matter of *prima facie* evidence attack where it was used as the basis for an indictment. And I am rather surprised that you gentlemen haven't devoted more cases to the attention of the

Court than this one cited in 131 Federal back in '42, seven years ago, and the cases mentioned by Counsel for the Government. I would like to be better informed as to what the reasoning of other courts has been in regard to that.

Mr. Hoddick: May it please the Court, there have been four cases that are cited under Section 2553 with reference to a motion for a bill of particulars, and in each of those cases the court discusses the principle that a motion for a bill of particulars is addressed to the discretion of the court. Unfortunately, in those cases the indictment charged the sale of narcotics as well as the purchase. And in connection with the sale I can well see where the defendant could come in and require the Government to show to whom the sale was made. In this case we have only asked for the purchase. In those cases it has been held that it is not an abuse of discretion for the court to deny the motion for a bill of particulars. It has been held that later they filed a motion to vacate the judgment because the counts were too vague and general; that the proper remedy for the defendant if he felt that they were too vague and general was to have [17] filed a motion for a bill of particulars.

The Court: Well, if you admit that where a sale is alleged, that it is necessary for the Government to show in the indictment or by supplementary information to whom the sale was made, it seems to me to be the same reasoning is equally essential that in the allegation of purchase that you should show from whom the purchase was made.

Mr. Hoddick: No, your Honor, because in the case of a sale the possession of the narcotic will be in the hands of the person to whom they are sold.

The Court: Not necessarily. He may have used them.

Mr. Hoddick: But anyway the only way you find out by the sale is from the purchaser, so you have his name. But when you charge a purchase, the only way you have evidence of the purchase is the possession by the defendant.

The Court: The view is that that puts a burden upon the possessor.

Mr. Hoddick: That is correct, and I think that is a proper burden, your Honor, where you have contraband articles. These are narcotics. These are things that people deal with in the back streets as well as use them for medicinal purposes.

The Court: Well, I'd like to have more legal light on the thing than I have gotten this morning. I will continue the matter for further consideration by myself, and I should [18] like to have more authorities presented to me.

Mr. Hoddick: Your Honor, I think that the reason there is so little authority in the books is—well, the simple hypothesis that the defendant is the only one who will know how he came into possession. What you are going to try in the case is whether he had possession or not, and if you prove that he had it, or make a substantial showing that he had it, then the defendant is going to show that he acquired it in a lawful manner.

Mr. Landau: Well, my theory, if the Court pleases, is quite the contrary. The reason there is so little authority on the books is that motions for bills of particulars have been granted. Therefore, there have been no occasions to go up to the appeal courts for denial of the motion.

Mr. Hoddick: If the motion is granted in this case, your Honor, you literally preclude the Government from presenting to the Court the *prima facie* evidence which is provided for in the statute.

The Court: But, on the other hand, if you indict a man purely on the statement that this and that is *prima facie* evidence of guilt, infraction of some law, why, where would become the presumption of innocence?

Mr. Hoddick: Congress has felt that in connection with narcotics it is essential to modify that presumption of innocence. [19]

Mr. Landau: Congress couldn't modify the presumption of innocence. It is what the courts in protecting the defendant say that is material.

Mr. Hoddick: I would be glad to submit a memorandum to the Court, if the Court desires, on the subject.

The Court: I'd like to have further light on the thing from whatever sources I can get it. I think I shall continue this matter. How long do you think that Lantis case will take in the trial?

Mr. Hoddick: I think one day, your Honor.

The Court: You think that will be enough? Could you gentlemen be ready by next Monday?

Mr. Landau: What day is that?

The Court: October 3rd.

Mr. Landau: Well, your Honor, I will not be in the office on the 3rd.

The Court: How about Wednesday, October 5th?

Mr. Hoddick: That is agreeable to the Government, your Honor.

Mr. Miho: I have a trial in the Circuit Court. I think it covers the entire week of October 3rd, and another trial on the 10th. But about the 12th or 13th.

The Court: Are you in this case, too?

Mr. Miho: I have the same motion. It is a different defendant but the same principles are involved and the same [20] motion.

Mr. Hoddick: May it please the Court, if you only desire the submission of a written memorandum or—

The Court: Yes, I'd like to have a written memorandum.

Mr. Hoddick: Then it seems to me that it doesn't matter whether Counsel are going to be occupied in court or not.

The Court: Do you suppose that you can furnish that by Monday, Mr. Landau?

Mr. Landau: Well, as I indicated to the Court, I will not come in at all into the office on Monday.

The Court: Well, I know, but could you submit it to the Court and then appear Wednesday morning? I think one of you will be enough to argue this proposition just the same—

Mr. Landau: Well, may I be permitted instead of Monday to try to get it in on Tuesday and give your Honor one day less?

The Court: Well, I have a jury trial on Tuesday and another one on Thursday.

Mr. Miho: Would it be at all possible to submit the memorandum by the 5th and then have an argument on the matter on the 12th when Counsel can be heard?

The Court: Well, the probabilities are that the calendars will shift. Monday is the 3rd. And on the 10th of October, the second Monday, the probabilities are that the calendars will shift. [21]

Mr. Miho: We can submit the memorandum by Tuesday, I should think, on both sides.

The Court: Well, what I had in mind was that if we can get your memoranda before the Court and give the Court a couple of days to look at your authorities and list them, and perhaps make some research, and so on, and then you might come in on Wednesday, the 5th, and if you have anything new to present—

Mr. Landau: I will try to get it in by the 3rd. I won't be in. I will have somebody else sign it for me. Perhaps Counsel will sign it.

The Court: I don't care where it comes from.

Mr. Miho: I will try to be here. I believe I can.

Mr. Hoddick: May it please the Court, since Mr. Landau and Mr. Miho are the movants in this case, I think it is only proper that they submit their memoranda in support of the bill of par-

ticulars, and then we be given an opportunity to reply to that.

The Court: Well, that was the idea, and having a couple of days between the time when the memorandum is submitted and the time when it is entertained by the Court. If they could get it in Monday, furnish you with a copy, Wednesday ought to be a proper time for hearing from you and for the Court to give consideration to whatever authorities and reasoning they had and to hear any further reasoning on [22] Wednesday for a brief time.

Mr. Hoddick: That is agreeable.

The Court: Then to continue the case until Wednesday, October 5th, with that understanding, that whatever authority you have or whatever reasoning in addition to what is thus far presented, put it down in writing and get it to the Court and get it to Counsel. And at the same time, if you have any additional matters to that you have expressed, you get that to the Court by Monday also and give opposing Counsel the benefit of that so that when we get together here on Wednesday morning we will know what each other is shooting at and what the reasoning and what the authorities are to back that up.

Mr. Hoddick: Yes, your Honor.

The Court: All that I want to do is to clear my mind of the thing so that I can feel that I am following the correct legal course.

(The Court adjourned at 11:20 a.m.)

October 7, 1949

(The Court convened at 10:05 a.m.)

Mr. Landau: If the Court please, Mr. Miho called me from one of the other courts and told me that he would be a little late and he asked me to appear in his matter.

The Court: Yes. Well, I have gone through the stuff [23] that you gentlemen submitted, and I come to the conclusion that the U. S. Supreme Court case, *Casey versus the United States*, statements made there and the reasoning of Justice Holmes disposes of the thing in my mind; that is, the question of this bill of particulars that is asked for. The Government admits that they can't furnish that bill of particulars. And this case here holds in effect clearly enough that it isn't necessary. Now, there is a dissenting opinion here by Justice McReynolds that expresses my past reasoning in the matter completely. It is the view that I took. But that is not the view that the majority of the court took, although it was a 4-5 decision. Four judges dissented. McReynolds wrote the most direct in point dissenting opinion to my view of it. I think it is quite illuminating, his view. He said,

“The provision under which we are told that one may be presumed unlawfully to have purchased an unstamped package of morphine within the district where he is found in possession of it conflicts with those constitutional guaranties heretofore supposed to protect all against arbitrary conviction and

punishment. The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary.

“Once the thumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, [24] now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry.

“Probably most of those accelerated to prison under the present Act . . .”

And that is referring to this Act making possession a *prima facie* illegality in having unstamped narcotics.

“Probably most of those accelerated to prison under the present Act will be unfortunate addicts and their abettors; but even they live under the Constitution. And where will the next step take us?”

That is about the way I would think. But Holmes, supported by three others, Sutherland, Stone and some other one, finds that with regard to the presumption of the purchase of the things manifestly not produced by the possessor, that there is a rational connection between the fact proved and the ultimate fact presumed. He cites that *Luria versus United States* case and *Yee Hem versus the United States*, and says,

“Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof.”

He cites Greer versus the United States and says, "The statute here talks of *prima facie* evidence but [25] it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates."

And he confirms that which was first expressed by Wigmore in his treatise on evidence. So that appears to be the law. So far as I can see, I am bound by this decision here.

Mr. Landau: I am just wondering whether there isn't a distinction—it may not be a strong distinction but in the case I cited the facts were that this gentleman, who is a member of our profession, as I recall the facts, was in the habit of visiting some of his clients in jail and giving them a little bit of assistance.

The Court: That is the case—

Mr. Landau: And he was dispensing—there was no question about it—he was dispensing for a price, and there was evidence of dispensing for a price.

The Court: That is all true, and he was convicted. Now, just what he was convicted for I don't know, but they went up on this proposition, this very same thing, and this is the thing that the court decides. He is rambling around here and he shows in other parts of his discourse that the other man was guilty of this and that and the other thing. But this was the only thing that they were dealing with. This was the thing that went up as an error, and the Supreme Court evidently granted certiorari

from the Ninth Circuit [26] Court and dealt with it.

So that I am satisfied now that the thing is a closed book to me and every other Federal judge. Certainly it doesn't meet my reasoning, but I can't pit mine against the Supreme Court of the United States.

Mr. Landau: Of course no motions were filed in that case, although it probably might not make too much difference in view of the manner in which Justice Holmes went into the subject. But there was no motion made.

The Court: So far as I can see, that is the only thing that they had to deal with. It was that one, —

Mr. Landau: The presumption.

The Court: —was that just one thing. The appellate there claimed that that was an un-Constitutional provision to make the mere possession of the thing as proof of evidence which the defendant had to overcome. And I don't quite see how they did it, but they did, against the four others who were strongly dissenting. I expect they had a lot of good, hot arguments among themselves. It was argued January 11th and not decided until April 9th. So I imagine they had a pretty difficult time with it, and finally the majority of them came to this decision. But the decision stands there today. And in view of that, I have got to deny the petition for a bill of particulars in those two cases.

Now, there is one other in which you said you could [27] furnish a bill of particulars?

Mr. Hoddick: And I have, your Honor.

Mr. Landau: That has been furnished, if the Court pleases. That is in Criminal No. 10,254. I might indicate to the Court that in the case of 10,256 there was only one count. And your Honor's ruling, of course, takes care of that. In 10,253 there were two counts. And your Honor's ruling takes care only of Count 1. And I think just for the purposes of the record we ought to get an order as to Count 2.

The Court: Yes, I have it before me. The first one alleges a felonious purchase.

Mr. Hoddick: Of opium and cocaine. The second count alleges a felonious purchase of marihuana.

The Court: Feloniously acquiring. Well, acquiring, is that the thing set out in the statute as unlawful?

Mr. Hoddick: That is in the statutory language.

The Court: Well, aren't they both the same?

Mr. Landau: There's a similarity, although I think that this particular case, this count does not come within all fours of the first count—in Count 1 he is not charged with being a transferee required to pay a tax. All that is, is that he purchased it and you have to prove possession, and that is automatically, according to that case, a purchase. But in 2593 it says, [28]

"It shall be unlawful for any person who is a transferee required to pay the transfer tax to acquire or otherwise obtain marihuana."

Now, their theory is in this case, of course, that all they have is the possession and that under the statute—

The Court: What particulars are you calling for in the second count, then?

Mr. Landau: I ask in what manner the defendant became a transferee required to pay the special tax, the time, place and circumstances when he did become a transferee, and if there is any distinction that they are making between "acquired" and "otherwise obtained," just what it is.

The Court: Well, the Government's answer is, I presume, the same in that case, that they are just not in a position to specify.

Mr. Hoddick: That is correct, your Honor, the statute making it a crime to unlawfully acquire or otherwise obtain marihuana, also makes possession of that marihuana in a slightly different language and proof that any person—the statute reads,

"... and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by Section 2591 to be retained by him, shall be presumptive evidence of [29] guilt under this section and of liability for the tax imposed . . ."

One statute uses the language of *prima facie* evidence and the other presumptive.

The Court: Now, you say you can't produce that?

Mr. Hoddick: No, your Honor. We will have to go to trial.

The Court: That is identically to my mind the same position as the other. I can't require the Government to produce something which they admit they can't produce. They are clearly standing on this *prima facie* evidence. This is a proper case for a jury, and naturally I'd have to instruct them according to the statutory law. We all think at different times that the jury doesn't pay much attention to the court's instruction about the law—

Mr. Landau: May we note an exception on behalf of both of these defendants in both cases to your Honor's ruling?

The Court: Yes. What else is there?

The Clerk: That's all we have, your Honor.

The Court: Well, I'm sorry we necessarily had to spend so much time getting to the bottom of what the courts' rulings have been on this. I am satisfied that this hasn't been overthrown by any subsequent decisions.

Mr. Landau: I checked on that. No, your Honor.

Mr. Hoddick: If your Honor please, I found a case of [30] *United States versus Van Wagenen-sager, Inc.*, in 34 *Federal Supplement* 735, and in that case the Government came in and stated that they did not have the particulars requested in the bill of particulars and were unable to furnish them. And the court ruled that they could not require the Government to furnish the particulars but that if the Government intended to introduce direct evidence at the trial of the case then they should turn it over to the defendant. And we will do that in this case, your Honor.

The Court: That sounds like square shooting.

Mr. Hoddick: Also, does your Honor care to set these matters down for plea?

The Court: Oh, there had been no plea entered?

Mr. Landau: No, your Honor, there has been no plea in these cases.

The Court: Are the defendants in a position to plead now?

Mr. Landau: Well, I think in view of the fact that we can't get the information I would request the Court's permission to discuss the matter with the defendants and find out whether they are in a position to plead.

The Court: Suppose you enter a plea, then, Monday morning at nine o'clock. The calendar will change at ten o'clock Monday.

Mr. Landau: Yes. [31]

The Court: Nine or nine-thirty.

Mr. Landau: We start a jury case before Judge Parks at ten o'clock. I see no reason why we can't be up here for a few minutes for that purpose.

The Court: All right.

(The Court recessed at 10:28 a.m.)

#### REPORTER'S CERTIFICATE

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings in the case of United States of America versus Winston Churchill Henry, in the

matter of motion for bill of particulars, held on September 28 and October 7, 1949, before the Hon. Delbert E. Metzger, Judge.

/s/ ALBERT GRAIN.

Mar. 16, 1950.

[Endorsed]: Filed April 20, 1950 U.S.D.C.

[Endorsed]: Filed May 1, 1950 U.S.C.A.

In the United States District Court for the  
Territory of Hawaii  
Criminal No. 10,253

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant.

Before: Honorable J. Frank McLaughlin,  
Judge, and a Jury.

APPEARANCES:

HOWARD K. HODDICK, ESQ.,  
Assistant U. S. Attorney,  
Appearing for Plaintiff;

O. P. SOARES, ESQ.,  
Appearing for Defendant;

SAMUEL LANDAU, ESQ.,  
Appearing for Defendant;

WILLIAM Z. FAIRBANKS, ESQ.,  
Appearing for Defendant.

PROCEEDINGS

Honolulu, T. H., November 1, 1950

The Clerk: Criminal No. 10,253, United States  
of America vs. Winston Churchill Henry. Hearing  
on motion for transfer of case.

Criminal No. 10,254, United States of America, Plaintiff, vs. Winston Churchill Henry, Defendant. Hearing on motion to transfer the case.

The Court: Are the parties ready?

Mr. Hoddick: Ready.

Mr. Landau: If the Court pleases, Counsel was to let me know before today; he indicated he was going to give me about a week's notice as to whether or not the motion was to be contested on either one of the two grounds here in question, either on the question of law or the question of evidence. Not having heard from him, I assumed there was going to be no contest on the motion. However, I am informed that he has been advised to contest the matter, at least on the question of law, if not on the question of the evidence itself. Because of the situation that I was not aware of, I am prepared—I am not prepared at the moment either to bring in any evidence or on the legal problem of law showing that I am permitted to ask for this transfer.

I have spoken to Counsel before Court convened, and he had forgotten to notify me. I, frankly, am not prepared to go forward on either ground, and with the Court's indulgence I would like to get a continuance so that I can prepare this matter, as I would have if the matter were contested.

Mr. Hoddick: May it please the Court, at the time Mr. Landau served the notice of motion upon me, I do recall that I advised him that if we were to have a contest of the law on this motion I would advise him in advance of the hearing. I did not know what our position would be prior to receiving

the word from the Department in Washington, which we did not receive until the latter part of the morning by cable, and they simply advised us to put up whatever defenses we could. Consequently, I have been unable to give Mr. Landau the notice which I advised him I would, and I am not averse to a reasonable continuance in the matter, although I am ready to go ahead at this time, if that is agreeable to the Court.

Mr. Landau: I would like to get the continuance so I can come up at least on an equal level with Counsel, so I can cite some authorities to the Court.

The Court: The legal problem isn't anything. The rule is clear. I should say the big problem is the facts and the evidence.

Mr. Landau: I will go ahead with what evidence I have here today, if the Court pleases.

The Court: I am not desirous of compelling you to do so in view of the confusion that has existed. All I am [2\*] saying is it doesn't seem to me the legal problem is anything like the factual problem. At this point all I really want from you is an expression of how much time you want.

Mr. Landau: In checking my calendar, if the Court pleases, I find that I am free on Thursday, the 10th, in the afternoon, if the Court and Counsel are free.

Mr. Hoddick: It is satisfactory to the Government.

The Court: All right, that is a little bit longer than I would like. We have a trial starting Monday,

but we will reserve Thursday afternoon, November 10.

Mr. Landau: Counsel just informed me I have a matter starting on the 9th.

The Court: Well, go backwards towards the first.

Mr. Landau: We can't come here on the 9th, because your Honor has that Papoose matter on the 9th.

The Court: That shouldn't take too long.

Mr. Landau: I am in Judge Moore's court on the 8th at 1:30. Does the Court want to set this down?

The Court: How about Friday of this week?

Mr. Landau: That is calendar day, if the Court please, over in Judge Parks' court room.

The Court: How long does that take?

Mr. Landau: We have a sentence, which puts us down at the end of the calendar. It will be around 3 or 3:30 before we get away. [3]

The Court: You name your time; it will be all right with the Government and with me.

Mr. Landau: Let's make it the 9th, if the Court pleases. If Judge Parks insists that we go in the afternoon, I will have to tell him I am ordered to be here at that time.

The Court: I will enjoin him if you want.

Mr. Landau: And that will be about 2:30, then, won't it, because it will take at least a half hour for that Papoose?

The Court: You are in that, too, aren't you?

Mr. Landau: Yes, your Honor.

The Court: Let's move the Papoose up to 1:30.

Mr. Landau: That is all right.

The Court: Move the Papoose, Mr. Clerk, up to 1:30 and we will take this up to follow, approximately at 2 o'clock. All right?

Mr. Landau: Thank you.

We are apparently going to be confronted with a problem at the next hearing with reference to the taking of testimony, especially of Mr. Fairbanks. Mr. Fairbanks is going back to the hospital Monday night, and will be gone for some time, so I thought perhaps we might meet the issue now as far as that testimony is concerned. There is a possible question of ethics and a possible question of hearsay testimony, and I will be frank, I will make an offer of proof now that Mr. [4] Fairbanks will testify he has spoken to people and people have made remarks to him about this case indicating prejudice among the populace. As I say, we have a question of ethics there because of Counsel taking the stand as a witness. And I intend not only to put Mr. Fairbanks on, but Mr. Soares and myself on that point. Now, whether or not that type of situation is actually covered by our ethical code is the situation. We are not talking about the merits of the case; we are talking about the underlying undercurrent and the feeling of the community, of which we naturally have been cognizant. We are probably in a better position than Mr. Smith and Mr. Jones out in the street to give the Court a true picture of the cumulative effect.

And then again, I say, Counsel, I understand, will object to the testimony on the ground that it is hearsay. Now perhaps it would be a good time to meet that issue right now, and with the Court's permission I will put Mr. Fairbanks on and as each problem comes up, we can thrash it out at that time.

Mr. Hoddick: That meets with the approval of the Government.

The Court: On the problem of the testimony by Counsel, presenting the problem of legal ethics, my recollection of the rule is that it is a canon of ethics which has this exception, that Counsel in a case may testify when he is [5] the only possible available witness. It would seem to me offhand, too, that since it is not a rule of evidence, but is more a canon of ethics, that it is upon you gentlemen to decide for yourselves whether you want to take the risk or not.

Mr. Landau: We don't want to violate any canons of legal ethics, if the Court pleases, except that before we have the opportunity of checking it to see whether or not we would be violating any code, Counsel, of course, will be in the hospital, and if we decide, under the peculiar circumstances of this case, it would not be a violation, he will not be available as a witness. However, I understand Counsel is not willing to assume the risk at this moment without further check of that matter.

The Court: If I were advising him, I wouldn't advise him to do it.

Mr. Fairbanks: I would much prefer to check the canon myself.

The Court: I think it is too risky, if I may give you a bit of unsolicited advice.

Mr. Landau: It is a matter we have considered and would like any suggestions we might be given.

The Court: I will be available to meet the convenience of Government and Defense Counsel at any time, and if it becomes necessary to take Mr. Fairbanks' testimony prior to the time he goes back into the hospital, I will make myself [6] available. I think this thing should be moved along expeditiously, and I will make myself available.

Mr. Landau: Thank you.

The Court: I will even come down Saturday, if you want.

Mr. Landau: We will let the Court know.

(Thereupon, at 2:25 p.m., November 1, 1949, an adjournment was taken until November 9, 1949.) [7]

November 9, 1950

(The hearing was resumed at 1:35 p.m.)

The Clerk: Criminal No. 10,253, United States of America versus Winston Churchill Henry; and Criminal No. 10,254, United States of America versus Winston Churchill Henry, for hearing on motion to transfer case from the District of Hawaii.

Mr. Landau: If the Court pleases, I would like to submit this motion, that is, on the failure of the Government to file counter-affidavits on the question of prejudice in the community. I refer to the case of United States versus Reece which is

cited in 280 Federal at 913, the particular reference being at page 916.

“Coming to the motions to change the place of trial. The affidavits of the defendant, his counsel, and a number of other individuals set forth with considerable detail reasons tending to show that a spirit of hostility and prejudice has been excited against the defendant, growing out of the failure of the bank of which he was president, and tending to show that that prejudice has ramifications to a very considerable extent throughout the whole of the division in which the indictments were returned, and it may be said, without more, that, accepting these affidavits for all they tend to show, they are sufficient *prima facie* to make out a case where the rights of the defendant would be unduly jeopardized by compelling him to go to trial in that district. These affidavits have not been met by the Government by any countershowing by affidavits on the part of the United States attorney and presumptively because no such showing was available.”

In other words, apparently there is a duty on the Government by counter-affidavit to show that no such hostile prejudice is in the community.

Also, I call the Court’s attention to the case of Kersten versus United States, in 161 Federal 2nd, 337, where, although the motion was denied, the court there on page 339 stated,

“The motion was verified, and averred that the news items and newscasts had created such a prejudice against Kersten in the District of Colorado

that it would be impossible for him to have a fair and impartial trial by a jury drawn from such District. It was also supported by affidavits. The United States introduced counter affidavits."

In other words, there is considerable justification and reasoning from these two cases that there is a duty upon the Government to file counter-affidavits; and failing to do so, we have made a *prima facie* case warranting the granting of [9] the motion.

Mr. Hoddick: It is my understanding, your Honor, that the Government can come in either with counter-affidavits or can come in with witnesses to rebut the evidence set forth in the affidavits filed by the movant. And in this case it is the Government's intention to call witnesses to the stand to show that there are at least available in this community persons who are eligible to serve on a jury, if they were called, who would not be so prejudiced by virtue of the wide publicity that the defendant has received in this community and who could serve fairly and impartially.

Mr. Landau: I think this situation is rather similar to the civil rule, if the Court please, on summary judgments where counter-affidavits would be necessary.

The Court: Well, what is the rule number?

Mr. Hoddick: Rule number 21, your Honor.

The Court: It doesn't say a thing about affidavits, does it?

Mr. Landau: No, your Honor, it doesn't say anything except that we have judicial determination that apparently——

The Court: That sets the rule.

Mr. Landau: Well, 161 Federal 2nd, 339, was decided June 16, 1947.

Mr. Hoddick: But all that case holds, Mr. Landau, is that in that case they did file counter-affidavits. [10]

Mr. Landau: That's right.

Mr. Hoddick: No holding by the court that counter-affidavits be filed.

Mr. Landau: But we have the authority of the prior case, United States against Reece, which shows that an affidavit, that counter-affidavits are necessary. And they were, in fact, filed in the Kersten case.

Mr. Hoddick: As a matter of fact, I don't think that your Reece case actually holds that, Mr. Landau.

Mr. Landau: Read that.

Mr. Hoddick: This is the first time I have seen it. That is in the District Court in the District of Idaho, in 1922. On this score, your Honor, in going over the Digest I noted that in some cases counter-affidavits were filed and in others they were not. In this case we preferred to wait and bring witnesses into the courtroom and testify directly to the Court, and where it would be possible for counsel to cross-examine them.

The Court: In the absence of some provision in the rule providing for the handling of a motion under this rule like unto the handling of a motion for summary judgment, I cannot at this time, for

lack of affidavits filed by the Government, take the motion. The motion is called today for a hearing, and I presume at this time both sides are prepared to introduce evidence pro and con as to whether the motion should or [11] should not be granted.

Mr. Landau: May I take an exception to that?

The Court: You may.

### FRED HOWARD

a witness in behalf of the Defendant being duly sworn, testified as follows:

#### Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Fred Howard.

Q. Where do you live, Mr. Howard?

A. I live at 366-B Hobron Lane.

Q. And where are you employed?

A. I was born in Arkansas.

Q. No, where are you employed?

A. Employed, the Civil Service Commission with the Army.

Q. With the Army? Mr. Howard, in the past few months have you had occasion to have people talk to you about one Winston Churchill Henry?

A. I have had three ladies and one man, and I have been in socials and I have also heard people, you know, speaking about it.

(Testimony of Fred Howard.)

Q. Well, now, will you tell the Court what people have told you concerning one Winston Churchill Henry? [12]

Mr. Hoddick: I object, your Honor, on the grounds that anything this man says what people told him concerning Winston Churchill Henry is hearsay and is not admissible in evidence.

Mr. Landau: Now, we must admit that all the testimony, or most of the testimony, concerning this matter will be hearsay, what people have said, what he has gathered therefrom, what conclusions he has arrived at.

Mr. Hoddick: I won't admit such thing. If you want to prove prejudice in this community, you will have to show that prejudice in the witnesses that you call to the stand.

Mr. Landau: That's absurd. I will have to call 550,000 people to do that. I am trying to prove a situation which exists in the community as evidenced by statements that have been made to individuals in the community. It's the only way we can prove it. Sure, we may be able to find 20 people that aren't prejudiced. We want the general tenor, the general opinion in the community.

Mr. Hoddick: Your Honor, if I might suggest, I think that this man could testify as to statements made to him to show that such statements had been made, but not to prove that prejudice existed in the minds of the people who made the statements. In other words, he can testify of his own knowledge that he heard these statements, but

(Testimony of Fred Howard.)

he can't state as to their truth or veracity, and I don't believe that they can be considered by the Court as reflecting the existence [13] of prejudice in the community.

Mr. Landau: All this witness and any other witness we put on will testify is to statements that were made, which counsel says we can do. We are not going to infer that those people would testify that they were prejudiced. But based on those statements which were made to this witness, he can render an opinion as to whether or not prejudice does or does not exist.

The Court: All right. Go ahead on that basis.

Q. (By Mr. Landau): Will you talk slow and loud, please?

A. After overhearing the conversation, why, the people that made these statements——

The Court: You are talking about the three ladies and one man? I want to know. It that what you started off telling me about?

Q. Talk about the three ladies and one man first.

A. O.K. That was a lady which had just spoke to me this morning. She says, "You know this Winston Churchill Henry?" She says, "You know, I think he has a lot of nerve. People like him shouldn't be allowed to come to the Islands, nor bring—criminals like that shouldn't be allowed to come to this Island to live. He should be run off."

"Well, I know him; he's been a pretty nice fellow, because, you know, I'm not sure as to his vice." [14]

(Testimony of Fred Howard.)

So she says, "Regardless of circumstances they say he did it, and the fact that they say that, I believe it. I read this and that in the paper." And she says, "I believe what I read. In a case like that I think he should be run off."

Well, I never knew this gentleman's first name. How I come to know his first name, there was a girl; she asked me, did I know Winston Churchill Henry, and I says, No, I don't. I heard the name before. It's very familiar. She showed me the paper with the headline. She says, "Did you read it?" I said, "No." I said, "No, I haven't. Let me see it." So I read about it. And she said, "Well, don't you think that's awful?" I said, "Well, in a way of speaking I think it is." And she says, "Well, I say I'm not familiar with the case but just from what I read in the paper it sounds awful." And she says, "Don't you think they ought to put him in jail and lock the key away?" And I said, "I'm not familiar with all the circumstances; maybe he's guilty and maybe not. As far as that's concerned, I'm not the one to decide."

O.K. Another time I was out at a social with a mixed group and I overheard two people talking, and one says, "What do you think about this case of Winston Churchill Henry?" And the other one says, "Well, look, they ought to chase him off the Islands and put him in jail." And the other one said, "Well, he should—" —I can't remember the

(Testimony of Fred Howard.)

exact—that's about all I can remember. I have heard quite numerous remarks about that.

Q. Have you been recently in one of the outside islands, Mr. Howard?

A. Recently what?

Q. In one of the outside islands?

A. No, I haven't. Ever since I came here I have been here.

Q. Have you been in Hilo at any time?

A. No, I haven't.

Q. You said something about Hilo to me outside.

A. No, it wasn't I.

Q. Oh, it wasn't you. That's correct. Have you heard any other statements that you can recall about this gentleman?

A. No, not that I can remember.

Q. Well, now, based upon the statements which have been made and the remarks that have been passed in your presence, Mr. Howard, do you have an opinion as to whether or not people in this community are prejudiced against Mr. Winston Churchill Henry? Just answer that question Yes or No.

Mr. Hoddick: I object.

A. Yes.

The Court: When the lawyers are objecting, just hold off. [16]

Mr. Hoddick: I object to any answer that the witness might give or might have given. I move that the answer be stricken. The man is called upon

(Testimony of Fred Howard.)

to render an opinion, and it is opinion evidence, and I don't believe it is admissible. There is no showing that he is competent perhaps to determine whether there is a prejudice within the community. You'd have to invite an expert, somebody who knows something about perhaps mob psychology or something on that order. There is no showing that this witness, on the basis of free statements which he heard made, is able to express an opinion which will bear any weight in this Court as to whether such prejudice exists.

The Court: Well, he can certainly state whether or not he has, as a result of assembling the thoughts of people whose views he has illustrated by his testimony—he can state whether or not he has an opinion. Whether or not he'd be allowed to state what that opinion is, is another thing.

Mr. Landau: May I address myself to that problem at this moment?

Mr. Hoddick: I perhaps anticipated the second question, your Honor.

The Court: Let's get at it squarely.

Q. (By Mr. Landau): Do you have an opinion, Mr. Howard, as to whether or not— [17]

A. Yes, I do.

Q. Don't tell us what the opinion is. Just say Yes or No. Do you have an opinion?

A. Yes.

Q. All right, now, here is the question, Don't

(Testimony of Fred Howard.)

answer it until the Court says you may. What is your opinion as to whether or not the defendant, Winston Churchill Henry, could get a fair and impartial trial in this community?

Mr. Hoddick: I will object to that question on the same grounds that I previously stated in connection with the previous question.

Mr. Landau: Prejudice, if the Court pleases, is opinion. We don't need an expert to render an opinion on this matter. The man is a resident of the community. He is perfectly justified, as the Court or I would be, to be able to tell and render an opinion as to whether or not there is prejudice or there is not prejudice against a certain fact or certain situation or certain individual.

Mr. Hoddick: May it please the Court, it is true that prejudice is opinion, and this man could undoubtedly be asked directly whether he himself is prejudiced or not, but I do not think that this man is competent to give an opinion as to what the tenor of prejudice or non-prejudice is in the entire community, which is what is at issue here before your Honor today. [18]

Mr. Landau: We are trying to show prejudice in the community, if the Court pleases. We can only do it by people who have been in the community. We can't bring everybody in the community to testify that they have or have no prejudice against this man.

(Testimony of Fred Howard.)

Mr. Hoddick: You can bring in a good sampling and you can ask them questions which they are competent to answer.

Mr. Landau: We would be here from now until doomsday if we were to do that.

The Court: Well, the question, as I understand it, is whether or not, based on his prior testimony, he has been able to form an opinion as to whether or not with regard to this case in this Court the defendant can get a fair trial.

Mr. Landau: That's right.

The Court: Before a jury. I don't feel that there is a foundation for expressing an opinion. I am not so bothered with his voicing an opinion if he has made a fair sampling and if he shows some knowledge of the judicial process.

Mr. Landau: Your Honor, it is impossible for us from one witness—one at a time—to have him come in and say that he can talk for the entire community. He can talk for some members of the community that he has been in contact with. He has given you just a little segment. We will have somebody else to give you a little more segments. Whether or not [19] we are going to be able to give you enough so that we could have one hundred per cent of the community, I don't know. I don't think it is necessary.

The Court: Well, he has talked about three ladies and one man and one woman. And women aren't allowed in our juries. And as to one man. I don't know whether he is a resident and could be

(Testimony of Fred Howard.)

summoned as a juror or not. I don't know if this man knows a thing about the judicial process against which to evaluate these—

Mr. Landau: I don't believe, if the Court pleases, that whether or not these people are citizens or not citizens, whether he knows anything about the judicial process, is at all material in this case. He wants to give your Honor a picture, or at least something that is in the air, which he, in his little way, has been able to gather. In other words, it is not anything that is tangible. It isn't anything that you can fix your finger on. It is something that is flitting and floating around.

The Court: Well, you are asking him his opinion as to whether or not, having formed an opinion from this sampling, whether or not in his opinion this defendant in this case and in this Court could get a fair trial. That necessarily involves some knowledge of the judicial process, the minute you talk about a fair trial.

Mr. Landau: Well, let me rephrase the question and [20] eliminate the—

The Court: Restate your question.

Q. (By Mr. Landau): Mr. Howard, as a result of these conversations that you had, these matters that you have overheard, do you believe or do you have an opinion as to whether or not there is prejudice in the community against Mr. Henry, and if there is, if your answer to that would be yes, will you tell the Court what your opinion is as

(Testimony of Fred Howard.)

to whether or not there is prejudice or no prejudice against the defendant in the community?

The Court: Now, just a minute. It is a double question. I am going to object to that myself. One at a time.

Mr. Landau: Let's go back, then. Shall we start from the opinion, where he has an opinion?

The Court: Yes.

Q. Will you tell us what your opinion is, Mr. Howard, as to whether or not prejudice exists in the community against this Defendant?

Mr. Hoddick: And I object to that, your Honor, on the ground that there is not a sufficient foundation laid to show that this man is capable of testifying as to what the general tenor of prejudice or non-prejudice is in the community. As a matter of fact, the statements which he has quoted of these ladies and the man as saying does not reflect [21] in any way as to whether those individuals, if they were called and sworn into the jury box, would say yes in response to whether they could give the defendant a fair and impartial trial.

The Court: Well, that isn't the question that he has been asked. The question he is being asked is simply whether or not, as a result of what he has heard, does he have an opinion as to whether or not there is in this community prejudice against this defendant.

Mr. Hoddick: And he has said yes, he does have an opinion. And I do not think he should be per-

(Testimony of Fred Howard.)

mitted to give that opinion because I don't think there is an adequate foundation laid to show that he can have any idea as to what, as to whether prejudice exists or not.

The Court: Well, wouldn't that go to its weight? I am going to let him answer the question. I am inclined to think the objection is good but I am going to let him answer the question nevertheless.

Mr. Landau: What is your answer, Mr. Howard?

A. From what you read in the paper and from what you hear about in the public, naturally there must be a great form of prejudice. I'm sure that each and every one, I'm sure you walk the street and ride the bus, and I'm sure if each and everyone was honest with himself I'm sure he can say that they have heard such things spoken against this man [22] Winston Churchill Henry. Now, so far as prejudice, I can mention quite a number of instances, but due to the fact that the gentlemen of high standards—perhaps you don't, I'm sure you don't associate on the same plane, that is, you don't get around in the same districts, well, naturally you won't see and hear as much prejudice as I do. And naturally you won't understand. And then the chances are, if you do see or hear some, it is some particular one in the courthouse that might hear it and see some of those things but don't mention it. This is something that is floating around in the air.

Q. In your opinion, now, you believe that there is prejudice against the defendant in the community?

(Testimony of Fred Howard.)

A. Well, from the conversations and from what I hear then, I would say it is, not that I believe.

Mr. Landau: All right. Your witness.

### Cross-Examination

By Mr. Hoddick:

Q. Mr. Howard, how long have you been here in the Territory?

A. I have been here approximately one year and nine months.

Q. And if you were qualified and were called to serve upon a jury which was to try Henry on one of these Federal charges, and you were asked whether you could give the [23] defendant Henry a fair and impartial trial, despite the newspaper articles and the publicity and the conversation of people in the community——

A. I don't quite understand you. Speak a little louder.

The Court: He doesn't hear you. Are you a little hard of hearing, Mr. Witness?

Q. If you are qualified to serve on a jury in the Territory, and you were called upon to serve on a jury here in the Federal Court that was trying the defendant, Winston Churchill Henry, for a Federal crime, and you were asked, you would be asked before you were placed in the jury box as to whether you could give the defendant Henry a fair and impartial trial, despite the fact that he has had all of this publicity, and you heard all of these

(Testimony of Fred Howard.)

conversations and you have read the articles in the paper, what would your answer be?

Mr. Landau: Just a minute. Don't answer that question for a moment. I object to the question, if the Court please, on the ground——

The Witness: I will answer it.

Mr. Landau: Just a minute. I don't want you to answer it. I don't know what your answer is going to be. I want to get an objection in. I object to the question on the ground that it isn't the issue in this case. It isn't what [24] an individual juror would say, a man that would come up on the stand and say, well, I don't have any prejudice, I don't believe what the newspapers say and I am not influenced by it. It is not what an individual person would say as to his own prejudice. It is what prejudice is there in the community.

Mr. Hoddick: This man is a representative of the community. He is a part of the community. And what his own prejudice is is a reflection of what the community prejudice is. We are trying to do in a sampling sort of way what could only be tested properly in this Court by bringing in 530,000 people, as Mr. Landau pointed out. If we can find in this community 12 men who can grant the defendant Winston Churchill Henry a fair and impartial trial and who are not prejudiced, then this case should not be transferred to another district. It is ordinarily inferred by the Court, if there is a sufficient showing of prejudice in the community, that that cannot be done——

(Testimony of Fred Howard.)

The Court: The witness didn't testify as to himself on direct examination. I think you had better confine your cross-examination to what he testified to. The question is not what he would do. The question is as to whether or not his opinion has any significance. In other words, he testified as to what his opinion was as to whether there was prejudice against this defendant in this community. You [25] start off on your cross-examination treating him as if he were called as a juror. He didn't testify about that. We are talking on the general level rather than individual. I think you had better cross-examine him on what he testified to.

Q. (By Mr. Hoddick): Mr. Howard, you first testified that you heard, that you spoke with a lady who told you that the defendant Winston Churchill Henry—I think you used the term "should be run off," ought to be gotten out of the Islands; and you protested, after all, you didn't know whether he was innocent or guilty at this stage.

A. I didn't protest. I made a statement.

Q. Now, I would like to know, where did you have this conversation?

A. Beg pardon?

Q. Where did you have this conversation with this lady?

A. That I won't mention. You will have to get the people's permission first.

Q. The Court will instruct you, I believe, to answer.

(Testimony of Fred Howard.)

A. I would have to get the people's permission whether or not they would like to be involved.

Mr. Landau: Mr. Howard, you are not asked the names of the people, but the question is, where was this conversation [26] .

A. It is in here in Honolulu, naturally.

The Court: Just a minute.

A. But what particular place——

The Court: Are you hard of hearing?

The Witness: Slightly.

The Court: You had better come up here so we can hear you.

Q. (By Mr. Hoddick): When did the conversation take place, Mr. Howard?

A. This morning.

Q. Where? A. I won't care to mention.

Mr. Hoddick: May it please the Court, this runs to the credibility of the witness' testimony and I think he should be required to answer any questions concerning the details pertaining to these various conversations and conversations which he overheard that he testified to.

Mr. Landau: If the Court pleases, that comes down perhaps to one of the big difficulties which we have had in this case; the refusal of people to get involved as witnesses in this matter has been one of the difficulties; that counsel for the defendant by the canons of legal ethics are not properly permitted to testify in a matter in which they appear as counsel; and people around the community who

(Testimony of Fred Howard.)

have indicated [27] by statements of one kind or another on this matter, have refused to appear as witnesses; and we asked whether they would appear under subpoena to testify as to this prejudice and they have clearly stated that they would deny that they made any such statement to the party questioning them, counsel and Mr. Soares. And I think, however, that this particular question could be answered, whether it was in Honolulu or what particular street. But I am now anticipating the next question, the names of these people.

The Court: Let's deal with what is before us.

Mr. Landau (to the witness): Answer the question, just where in Honolulu, what street?

A. Well, to mention that, perhaps that would, perhaps that would—perhaps I would have to tell just where it was. Look, I have the name, I know the name of the lady, and if the lady, if she were subpoenaed I'm sure she would say the same thing because she's that type of a lady. But as I expressed myself I'm not sure that the lady would like to be involved.

Mr. Hoddick: Excuse me, Mr. Howard. May it please the Court, and Mr. Landau, I intend to further cross-examine this witness as to all the details surrounding these conversations and the social meeting which he said he attended, and I think we might have a ruling of the Court now as to whether I shall be permitted to and whether the witness will [28] be required to answer the questions or not.

(Testimony of Fred Howard.)

The Court: The lawyer just told him to answer the question. Mr. Witness, you testified on direct examination about these conversations. You had better answer the questions now whether you'd like to or not.

The Witness: You see, the people——

The Court: I know how you feel, but you gave that direct testimony and now the other side is entitled to get some of the details. And whether you like it or not, you have got to answer. Is there any basis here for advising him as to his Constitutional rights?

Mr. Landau: I don't know, your Honor.

The Court: You are the attorney on that side. You watch it.

Mr. Landau: All right.

The Court: I won't force you to that point. Now, the question is simply, where did this conversation with this lady that you mentioned take place on this morning?

The Witness: It happened at Fort Shafter.

The Court: At Fort Shafter?

Q. (By Mr. Hoddick): In what office, Mr. Howard?

A. Well, I may as well tell you her name, as I told you.

Q. I will start off—what is her name? [29]

Mr. Landau: I will object to it, if the Court pleases, on the ground that we are not concerned

(Testimony of Fred Howard.)

with individuals who have made statements. We are only concerned with whether or not statements are made. While it is true that counsel is asking the question on the question of credibility to determine whether or not this witness knows what he is saying, we do have an unfortunate situation, as I indicated to the Court, about these people not wanting to become involved in this matter. And there is an awful lot of it here, your Honor; and statements that were apparently made either in conversation or under conditions where it would not be believed that the persons' names would be brought into the case. I think that that is a confidence which this Court could ask this man, this witness, to keep.

Mr. Hoddick: I don't know of any such privilege, Mr. Landau.

Mr. Landau: Well, it is an unusual situation. It may be an unusual privilege, Counsel.

The Court: Well, I am reluctant, unless it is absolutely necessary, to force this witness to tell us the person's name; unless there be other ways of testing as to whether or not he is telling us a story out of whole cloth or whether these people really exist.

Mr. Hoddick: May it please the Court, we may desire to bring this lady down here and place her on the stand. [30] How are we to do it unless we know who she is?

Mr. Landau: That is just one of the reasons why

(Testimony of Fred Howard.)

he doesn't want to give her name. He doesn't want to get her involved.

Mr. Hoddick: I sympathize with what your witness desires and I sympathize with the problem that you face in bringing the witnesses to this Court, but I don't think we can choke off our rights to any cross-examination of this witness with the intention of showing that the opinion which he has rendered here in court is not a proper opinion or is not a correct opinion.

Mr. Landau: Well, I have told these witnesses, if the Court pleases, that in my opinion they do not have to answer specific questions as to names. I will not bring witnesses on the stand under any false impression or bring them under false colors. If this man is going to be required to divulge the names given to him in confidence, if the Court pleases, I will withdraw him as a witness.

The Court: I haven't heard anything about names given him in confidence. All I know is that the man said he had a conversation this morning with a lady. He is being asked where, and now directly who. There is nothing about confidence here that I know of.

Mr. Landau: He said something about the person not wanting to become involved in this case. [31]

The Court: Well, there are lots of people that don't want to become involved, but if they say and do things, whether they like it or not, maybe they are involved.

Mr. Landau: Well, if this witness who is em-

(Testimony of Fred Howard.)

ployed there is going to feel embarrassed by answering a question as to names, any specific person, I will withdraw him as a witness, if the Court pleases, if Counsel forces the issue. I am not going to have a witness come on the stand and testify as to a matter where I have indicated to him he would not be required to divulge the names of people who have made statements to him.

Mr. Hoddick: I am not certain that it rests within the privilege of Counsel at this stage in the proceedings to withdraw the witness. I would suggest that the Government will have no objections if you will agree to withdraw the witness and stipulate that the testimony which he has given here in the court will be stricken from the record, and I will ask him no further questions.

Mr. Landau: May we withdraw this witness for the time being, if the Court pleases, subject to striking out his testimony, and let us go on further?

Mr. Hoddick: No, your Honor, I will object to that. If cross-examination of the witness is to continue, I'd like to do it at this time while what he said is fresh in his mind and fresh in ours. I'm afraid he'll have to answer the [32] question or either withdraw and strike the testimony—

Mr. Landau: Just a moment. (Mr. Landau confers with the Defendant.) Mr. Henry agrees with me that there should be nothing to prejudice this man with his employment. And we will withdraw the witness.

(Testimony of Thomas Lampley.)

The Court: The witness is excused and his testimony is stricken. You are excused.

(Witness excused.)

### THOMAS LAMPLEY

a witness in behalf of the Defendant, being duly sworn, testified as follows:

#### Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Thomas Lampley.

Q. And where do you live, Mr. Lampley?

A. 1508-B Emma.

Q. And what is your business, Mr. Lampley?

A. I am a prize manager and I work for the Honolulu Gas Company.

Q. Now, during the past couple of months, have you heard people make statements or pass any remarks about one Winston Churchill Henry?

A. I have.

Q. Will you tell the Court some of those remarks [33] which you have heard, statements that have been passed in your presence?

Mr. Hoddick: At this time, your Honor, I am going to object to the admission of that testimony as hearsay.

The Court: Overruled. It is definitely hearsay but I will let it in.

(Testimony of Thomas Lampley.)

A. Well, on different occasions in my business as a fight manager I get around in different places and I come in contact with a lot of people, and naturally read about Winston Churchill Henry in the paper, and me being a negro they always come up and ask me do I know him, and I tell them, yes, I know him. And even without me knowing their name they just strike up a conversation and start talking about him and say, Oh, well, they think he's got some money; they are going to break him; they've already got his time set; they said they already made up their minds about his time, but after they break him they are going to send him up.

Q. Have you heard any other remarks indicating anything as to whether or not people had prejudged his guilt or innocence of these offenses with which he is charged? A. Well——

The Court: Wait a minute. Let's stick to ours in here. We only have one case, two cases, one defendant that you are concerned with. We are only concerned with this litigation [34] in this Court.

Q. All right. Have you heard people make any remarks indicating that they have prejudged the guilt or innocence of this defendant with reference to the cases which are in the Federal Court?

A. Well, when I was in Hilo in July, I came in contact with quite a few people down there and they starts discussing about Henry, what they read in the paper. And somebody said, "You know this character?" "Yes, I know him." "Well," they

(Testimony of Thomas Lampley.)

said, "what do you think they are going to do to him?" "That I don't know." "Oh, they'll get him. They are just taking their time. Just the same thing once they are here in Honolulu. As soon as they get his money then they are going to send him up. I know what they'll do for him around here." That's just what they said.

Q. Well, after these remarks, the statements that have been made to you and in your presence, Mr. Lampley, do you have an opinion—and this question can be answered yes or no—do you have an opinion as to whether or not there is any prejudice in the community against the defendant Winston Churchill Henry?

Mr. Hoddick: I object—and please don't answer. There is nothing that the witness has said which indicates the existence of a prejudice in the minds of the people with whom he spoke. All of the conversations which he has recounted [35] refer to what the people thought what I suppose the law enforcement officers would do in due course, but there was no indication that those statements that they had expressed was an opinion as to whether they themselves were prejudiced or as to whether there was a prejudice in the community.

Mr. Landau: On the theory that I might not have proven that sufficiently, I will go further into that matter.

Q. What other converstions have you overheard or people had with you with reference to this defendant?

(Testimony of Thomas Lampley.)

A. Well, I have heard them say, "Well, a character like that is no place in the Territory for him; they should just get rid of him; if I was the judge or jury I would just get rid of him, that's just what I would do." I heard people say it to me.

Q. Has that been on a few or many occasions?

A. Many occasions, because in my getting around I guess he comes up in the conversation about as much as boxing does in most places I go.

Q. Well, have there been any other statements made in your presence, Mr. Lampley?

A. It is mostly statements; all run just about the same; people's opinion about what they would do if they was to pass judgment on him; most all run the same, about getting rid of him or send him up, things like that.

Q. Now, based on the statements which you have heard, [36] and the conversations which you have had, do you have an opinion—this is yes or no, Mr. Lampley—do you have an opinion as to whether or not there exists in this community prejudice against the defendant, Winston Churchill Henry?

A. I'd say yes.

Q. You have an opinion? A. Yes.

Q. Will you tell the Court what your opinion is? Is there or is there not prejudice in the community against the defendant?

Mr. Hoddick: Objection, your Honor, on the grounds that there is not a sufficient foundation for this man to show that he has knowledge as to

(Testimony of Thomas Lampley.)

whether prejudice exists in the community or not. He may have inferred from his conversations with these people as to whether they themselves as individuals are prejudiced, but I do not think it has been shown that that is representative of the community as a whole.

The Court: Overruled.

Q. Will you tell us what your opinion is, Mr. Lampley?

A. Well, my opinion is that I'd say there is prejudice because most everyone is just like if they read anything in the paper about somebody else doing something, well, they never discuss it, but if it's Winston Churchill Henry they always come up and start discussing it with me, and they always make, have their minds made up right away what they [37] would do with him. But if somebody else does something or anything like that, they never discuss it or say anything about it. It's only him. That's why I say there is prejudice because they only discuss what he does.

Mr. Landau: Your witness.

#### Cross-Examination

By Mr. Hoddick:

Q. Now, Mr. Lampley, you said you were down in Hilo in July? A. Yes, sir.

Q. Can you give me the name of one person who has suggested to you that a character like that has no place in Hawaii and you should get rid of him?

(Testimony of Thomas Lampley.)

A. The name of one person?

Q. You said there were many of them. I'd like to have the name of just one.

A. One fellow I know by the name of Toy. All I know is "Toy." I don't know how to spell it.

Q. What is he, Chinese?

A. He is Oriental. I don't know what.

Q. And where do you know him. Where does he live?

A. Well, I just see him around bars. You know, I was living at a hotel down there, and, as I stated before, I goes to different bars and places in Honolulu and a lot of people know me, that I don't know them, by me handling fighters. [38]

Q. What bar did you see Mr. Toy in?

A. It was the Hilo bar.

Q. The Hilo bar? A. Hilo bar.

Q. That's here in Honolulu?

A. No, that's in Hilo.

Q. And you have seen him there very many times? A. Quite often.

Q. Do you know his first name?

A. I told you, Toy; everybody calls him Toy. That's all I know.

The Court: Toy or Choy?

The Witness: Well, it's Toy.

The Court: Toy?

The Witness: See, I was only down here about three months and naturally I only met one other colored boy when I was down there. Well, people

(Testimony of Thomas Lampley.)

in a small town, they read the paper and see me in the bar; they just come up to me and start talking, just many of them. And as soon as they see the paper they come up and they would approach me and asked me, "Do you know this Winston Churchill Henry?" And I tell them, "Yes, I know him." Sometimes I'd say, "No." But they all, I know they were saying it first because he was negro and they knew I was negro and they'd come up and start talking to me about it. [39]

Q. Was that in the early part of July or the last part of July?

A. Oh, I was in Hilo from June until September. Just what date in July, I couldn't tell you specifically what date.

Q. Mr. Toy is the only one by name who has discussed this matter with you? The only one you know by name? A. Yes.

Q. You have other friends in the community who are also negroes?

A. No, there was only one in Hilo. I only met one other negro in Hilo besides myself.

Q. Well, you are up here in Honolulu now.

A. Oh, in Honolulu, sure.

Q. And you testified that people up here had told you the same thing, didn't you?

A. Yes, but it was no negro person, just people in general.

Q. I understand that. But you have friends here in Honolulu who are negroes, do you not?

(Testimony of Thomas Lampley.)

A. Yes.

Q. And have you ever discussed Winston Churchill Henry with them? A. I have.

Q. And from your conversations with them, would you [40] give your opinion as to whether those people were prejudiced against the defendant or not? A. You mean negro friends?

Q. Your negro friends in Honolulu.

A. Well, in discussing things like that, some of them make a statement like, "I don't think they are going to be fair with him because I never got a fair chance like that." And those people come in contact with people the same like I do.

Q. What these people had to say to you, your negro friends here in Honolulu, is to what they thought the authorities would do to Henry, was it not? It wasn't a question of what they would do if they were in a position to do something?

A. No, they never said anything like that to me.

Q. As a fight manager you met lots of people, didn't you? A. I do.

Q. Lots of new people each week?

A. Yes, lots of people. Every time there's a fight I meet people, people generally come up and start talking to me. I never know their names. I may see them as people that I have been seeing in fights for the last five years around here, and if they walk into the door I couldn't tell you their names. Any other fight manager connected with sports like that would do the same thing. He couldn't tell you their names.

(Testimony of Thomas Lampley.)

Q. I know this would be difficult to do, Mr. Lampley, but of all the people with whom you have conversed during the last six months, could you give us an estimate as to how large a percentage of them have discussed the defendant, Winston Churchill Henry, with you?

A. How large a percentage of the people that I have met?

Q. The people you met and the people you know, the people you see every day.

A. It's just like you say; it's pretty difficult to do, a thing like that.

Q. Have all of them discussed Henry with you?

A. No, not all.

Q. Half of them discussed Henry with you?

A. At some time or other I'd say just about everybody in sports that I have talked to for any length of time they would say something about him.

Q. And has everybody in sports with whom you have talked to from time to time said something prejudicial about Henry?

A. Not all. But the only ones that did speak that they felt a prejudice towards him, they felt as though that the others were prejudiced towards him, because they spoke [42] that way to me. They said he won't get a chance. And these were not negro people.

Q. But there was no indication that the people you spoke with were prejudiced?

A. Oh, yes, because why I say that the majority

(Testimony of Thomas Lampley.)

is prejudiced is just like, as I said before, there's many cases that you read in the paper of different people doing different things, but there isn't any so widely discussed as him. Especially they will always come to me because he's negro and I'm negro. If somebody else goes out to rob or kill somebody, they don't come up and say anything to me about it, these same people that I meet every day. But if it's him, they come up to me because he's negro and I'm negro. And they want to discuss or find something about him. And I have had people come around and say, "Show me Henry"; come right downtown and say to me, "Show me this Henry, I want to see him, I read so much about him that I want to see him." And I don't know their name. And I say, "Well, I don't know him." "I want to see this guy."

Mr. Hoddick: No further questions.

#### Redirect Examination

By Mr. Landau:

Q. You say, Mr. Lampley, that some people who have spoken to you and did not indicate prejudice against Henry, did indicate that Henry would not get a fair chance? [43]

A. Yes, they said that.

Mr. Landau: That's all. Step down. Thank you.

(Witness excused.)

## RICHARD R. WILLIAMS

a witness in behalf of the Defendant, being duly sworn, testified as follows:

## Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Richard R. Williams.

Q. And what is your occupation?

A. Police reporter for the Star-Bulletin.

Q. And how long have you been police reporter, Mr. Williams? A. Two years.

Q. Now, Mr. Williams, you have been subpoenaed to appear here as a witness in this case?

A. That's right.

Q. Now, as police reporter it is your duty to write about the activities and doings in the police court, in the magistrate's court in Honolulu?

A. That's right.

Q. Now, Mr. Williams, on or about the 21st day of September did you cause to be written in the newspaper, the Star-Bulletin, a certain item entitled "Long List of Arrests [44] Shows on Record of Winston Churchill Henry?" A. I did.

Q. Now, prior to the time that that article appeared in the newspaper, was there a rough—I don't know what you would call it—a rough copy of this item printed for later publication?

A. No, there was not.

Q. Was there an article showing his list of arrests written up for subsequent publication?

(Testimony of Richard R. Williams.)

A. There was an article which contained his list of arrests.

Q. I see. It wasn't this particular one?

A. It was not that particular one.

Q. But there was such a list?

A. That's right.

Q. And if you remember, Mr. Williams, that item was prepared prior to the publication of the one that appears in this paper of September 21st, isn't that correct?

A. I don't recall whether it was before or after.

Q. I see. Do you recall that that particular item was left with the members of the District Court to comment on? A. It was.

Q. And do you recall whether or not I also looked at that document?

A. I was told that you did. [45]

Q. And do you recall that I told you that that should not be published? A. You did.

Q. And I asked you to see that it wasn't published? A. No.

Q. I asked you.

A. I don't believe that is correct.

Q. I will strike that. You said that that was a matter which your editor had requested you to write up? A. That's correct.

Q. And that the matter would be entirely up to him? A. That's correct.

Q. And the editor, of course, is Mr. Allen of the Star-Bulletin? A. That's correct.

(Testimony of Richard R. Williams.)

Q. At the time that I suggested to you that such an article should not be published, you knew that I was representing Mr. Henry?

A. That's correct, I did.

Q. And the case in this Court and on other matters? A. That's right.

Q. Despite my suggestion to you that such an article be not written and published, your editor did in fact publish it?

A. Apparently he did. [46]

Mr. Landau: I offer this in evidence, if the Court pleases.

Mr. Hoddick: No objection.

The Court: It may become—

The Clerk: Defendant's Exhibit No. 1.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 1.)

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#### DEFENDANT'S EXHIBIT No. 1

Honolulu Star-Bulletin,  
Wednesday, September 21, 1949

Long List of Arrests Shows  
On Record of Winston C. Henry

Behind the indictment last Thursday of Winston Churchill Henry is a long list of arrests and other items for the "police blotter."

Henry's latest tangle with the law is only one of many that extend from the Pacific coast to Hawaii.

(Testimony of Richard R. Williams.)

He is known to the police as "Frisco Shorty"—a nickname used on several occasions.

He is now charged and indicted by the federal grand jury, on charges of illegal possession of narcotics and selling liquor without a license.

\* \* \*

The indictment on the narcotics charge came after he was arrested on July 16. Henry, along with Mrs. Helen Thomas, 28, was arrested at 803 Hausten St., following a joint federal-Honolulu police raid.

Mrs. Thomas was freed by U. S. Commissioner Harry Steiner. He said there was insufficient evidence to substantiate the charges.

### Raiders Made Fat Haul

In that raid more than \$50,000 in narcotics was seized by the raiders. Included in the narcotics was marijuana, cocaine, and heroin. A sub-machine gun, a pistol and an army rifle were also seized.

The firearms case is still pending in district court.

On August 7 Henry was charged with operating as a liquor dealer without a federal tax stamp, permitting gambling in his home and being in a barricaded place. The indictment on the liquor charges came after this raid.

The charges followed another joint federal-Honolulu police raid at 408 Keoniana St. Seventeen others were arrested at the same time. They were charged with gambling and being in a barricaded place.

### Henry's Partner Skips Out

Following that raid Henry's gambling lieutenant,

(Testimony of Richard R. Williams.)

Charles W. Montgomery, 46, was fined \$125 in district court on August 18. He left town that night by plane. "This town is too hot for me," he told a Star-Bulletin reporter.

Montgomery also was arrested following the Hausten St. raid but was not charged. The case against the 17 others from the Keoniana St. raid is also still pending.

#### Here's Henry's Record

Henry's police record extends from Alaska to Hawaii.

Following is his Hawaii record:

August 25, 1947—Arrested for soliciting. He pleaded not guilty and was committed to circuit court where the case was thrown out for lack of evidence.

January 3, 1948—Charged with profanity and given a 13 months suspended sentence which he appealed. On the appeal he was fined \$10 in the first circuit court.

May 3, 1948—Charged with loitering and committed to circuit court, where he demanded a jury trial and pleaded not guilty. The case was thrown out in the first circuit court.

July 17, 1948—Arrested for spitting on the sidewalk. He forfeited a \$10 bail.

\* \* \*

August 28, 1948—Charged with assault and battery on a police officer. He pleaded not guilty, demanded a jury trial and was committed to circuit court. He was found guilty and sentenced to 60

(Testimony of Richard R. Williams.)

days in jail, suspended for 13 months and fined \$200.

August 28, 1948—Charged with possessing unregistered firearm. Pleaded not guilty, demanded jury trial and committed to circuit court. The case was remanded to district court where it is still pending.

On the same date he was charged with illegally acquiring a firearm. That case too, is still pending in district court.

July 16, 1949—Possession of a machine gun and violation of firearms regulations. Still pending in district court.

July 21, 1949—Charged with being in a barricaded place and permitting gambling in his home. Still pending in district court.

#### Record on Mainland

Following is Henry's mainland record—at least, what police and federal authorities know of it:

August 1, 1934—Charged with petty theft in El Centro, Calif. He was sentenced to 50 days in jail.

\* \* \*

March 31, 1939—Charged with a traffic violation in El Centro and fined \$50.

September 13, 1945—Charged with disorderly conduct in Juneau, Alaska, and fined \$100.

Several other arrests for various offenses committed on the mainland are on record here.

Dispositions of these cases have not been received.

Admitted Nov. 9, 1949.

(Testimony of Richard R. Williams.)

Mr. Landau: I will comment on those as we go along, if the Court pleases.

Q. Now, Mr. Williams, I show you this item which somebody tore out for me but didn't give me the whole sheet, and ask you whether you were responsible for that? A. I am.

Q. And in that item you say that Mr. Henry is one of Honolulu's better-known underworld characters? A. That's correct.

Mr. Landau: I offer this in evidence, if the Court pleases.

Mr. Hoddick: No objection.

The Court: It may become—

The Clerk: Defendant's Exhibit No. 2.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 2.)

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#### DEFENDANT'S EXHIBIT No. 2

Nine

Frisco Shorty Trial  
Set for November 22

Winston Churchill Henry is scheduled to appear in district court November 22 for arraignment, plea and trial on charges of illegal possession of an army automatic rifle.

\* \* \*

Friday, Henry, also known as "Frisco Shorty," was acquitted of a charge of illegal ownership of the rifle. As he left the police station Sgt. Hong

(Testimony of Richard R. Williams.)

Sing Chang met Henry with a warrant on the illegal possession charge.

One of Honolulu's better known underworld characters, Henry is to appear in district court Wednesday again on charges of being in a barricaded place.

Admitted Nov. 9, 1949.

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Mr. Hoddick: I might ask Counsel, do you know the date?

Mr. Landau: I'm afraid I don't Counsel. But it says [47] that the case will be set for November 22nd. So we must assume that it was before November 22nd.

Mr. Hoddick: You represented, you are going to represent him beyond, you represented beyond that in that case. Do you know as to your own knowledge when that setting was or how long ago?

Mr. Landau: I will tell you. I believe it was around October 19th.

Mr. Hoddick: I'm willing to stipulate that it was October 19th for the purposes of identifying this article.

Mr. Landau: O.K.

The Court: Very well.

Q. Showing you the Honolulu Star-Bulletin for Thursday, July 21, 1949, I ask you whether this item that was written by you, whether this item was written by you? A. I'm not—

Q. You did not write it? A. I did not.

(Testimony of Richard R. Williams.)

Q. Did you see it in the newspaper?

A. I did.

Q. Do you know who wrote it?

A. I'm not sure.

Q. But this is your newspaper and you did see it at the time? A. That's correct. [48]

Q. And in this item Mr. Henry, the defendant, the defendant in this case, is stated to be the boss of Little Harlem?

Mr. Landau: I offer this in evidence, if the Court pleases.

Mr. Hoddick: What is the date of that?

Mr. Landau: July 21, 1949.

The Court: It may become—

The Clerk: Defendant's Exhibit No. 3.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 3.)

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#### DEFENDANT'S EXHIBIT No. 3

Honolulu Star-Bulletin,

Thursday, July 21, 1949

#### Little Harlem's Boss Arrested

Winston Churchill Henry, "The boss of Little Harlem," was arrested for the second time in less than a week during a raid on a house at Keoniana St. and Kalakaua Ave. in Waikiki at 1:30 this morning.

Henry and 16 other men were taken to police

(Testimony of Richard R. Williams.)

headquarters after raiding officers unexpectedly interrupted a dice game.

Henry was charged with permitting gambling at his home and released about 3:30 on \$250 bail. At the time of arrest he was free on \$1,100 bond on charges of illegal possession of narcotics.

The other 16 men were charged with being present at a gambling game. Bail for each was set at \$100.

Admitted Nov. 9, 1949.

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Q. Showing you the Honolulu Star-Buletin for Tuesday, September 27, 1949, I ask you whether you wrote this article entitled "Acting Police Chief Scores Henry Case?" A. I did.

Q. And did you get the statement from the Chief of Police which you have ascribed to him in this document?

A. I got it from the Acting Chief of Police, Farr.

Mr. Landau: I offer it in evidence, if the Court pleases.

The Court: It may become—

The Clerk: Defendant's Exhibit No. 4.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 4.)

(Testimony of Richard R. Williams.)

### DEFENDANT'S EXHIBIT No. 4

Honolulu Star-Bulletin,  
Tuesday, September 27, 1949

#### Acting Police Chief Scores Henry Case

Acting Police Chief George M. Farr said this morning that he conferred with Public Prosecutor Charles M. Hite in reference to the nolle prossed case Monday of Winston Churchill Henry and 17 others.

Chief Farr said they discussed the case and Mr. Hite is to give the chief instructions on how to follow up on the case.

\* \* \*

"I'm quite concerned," the chief said, "because I don't feel the court was fair in not granting the continuance. The defendant has been granted several continuances.

\* \* \*

"Also I can't understand why the prosecutor could not carry on the case with what witnesses he had. He had the man who served the search warrant and the man who led the raid."

#### Star Witness Sick

Judge Leslie P. Scott Monday denied a request by the prosecution to continue the case. Officer Frank Anderson, whom the prosecution termed its "star witness," was sick and could not appear in court.

(Testimony of Richard R. Williams.)

The defendants were arrested in May following a joint Honolulu police-federal raid at 408 Keoniana St. in Waikiki. They were charged with gambling and being in a barricaded place.

\* \* \*

U. S. Narcotics Agent William K. Wells led the raid with Lt. Hugh Whitford, then captain of the vice squad. Wells served the search warrant on Henry.

Lt. Whitford and several other officers of the raiding party were standing outside the courtroom Monday but were not called in. Mr. Wells says he was not subpoenaed.

#### May Reopen Case

Chief Farr says there is a good possibility the case will be reopened. He said Mr. Hite was to confer with his assistants this afternoon.

\* \* \*

Assistant Public Prosecutor Noboru Nakagawa says no attempt was made to try the case Monday. "We were told that it was Officer Anderson who would be the most capable witness since he was the first one in the house," Mr. Nakagawa said.

\* \* \*

"But the case isn't out the window," he said. "The case can be reopened at any time and there's a good possibility it will be," he said.

(Testimony of Richard R. Williams.)

Winston C. Henry's Attorney Asks  
Bill of Particulars

A detailed statement by the government of facts involved in connection with federal charges against Winston Churchill Henry, 35, 408 Keoniana St., was requested today.

To obtain this, Samuel Landau, defense attorney, filed a motion for a bill of particulars before Federal Judge Delbert E. Metzger. Argument on the motion is to be heard Wednesday morning.

\* \* \*

Henry is charged in two indictments with violation of federal narcotics and liquor laws.

\* \* \*

A similar motion was filed on behalf of Kershaw Weston, same address. He is charged with federal liquor law violation.

Admitted Nov 9, 1949.

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Q. Showing you the Honolulu Star-Bulletin for Thursday, October 6, 1949, Mr. Williams, did you write this article that appears under the heading, Judge Rejects Circumstantial Evidence—So—Winston Churchill Henry Again 'Beats Rap'; Two Cases Pending"? A. Yes.

The Court: When you say you write an article, does that include the headline?

The Witness: No, it does not.

Mr. Landau: I see.

(Testimony of Richard R. Williams.)

The Court: What is the date of that?

Mr. Landau: October 6, 1949. May I offer this in evidence?

The Court: Yes.

The Clerk: Defendant's Exhibit 5.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 5.)

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#### DEFENDANT'S EXHIBIT No. 5

Honolulu Star-Bulletin,  
Thursday, October 6, 1949

Judge Rejects Circumstantial Evidence—So—  
Winston Churchill Henry Again  
'Beats Rap'; Two Cases Pending

Winston Churchill Henry has "beaten the rap" again.

He and 11 others were found not guilty of gambling in a decision handed down Wednesday morning by Judge Clifton H. Tracy.

The 35 year old man—dubbed "Frisco Shorty" by police—has been arrested eight times in Hawaii on charges ranging from spitting on the sidewalk to illegally possessing firearms and narcotics.

His only major conviction is on a charge of assaulting a police officer. He was fined \$200 and given a 60 day suspended jail sentence.

The acquitted men were arrested at about 1:30

(Testimony of Richard R. Williams.)

in the morning of July 21 after a raid on Henry's house at 408 Keoniana St. in Waikiki.

Federal agents and members of the Honolulu police department's vice squad scaled the walls around Henry's place in what was intended to be a surprise raid.

But a woman on the lanai saw the raiders and screamed. By the time police reached the main room of the house, its occupants were dispersing from what police asserted was a gaming table.

Police Officer Hiram Tasaka was first to reach the room. He made a dive for the table and came up with a layout cloth, a pair of dice and a nickel.

But nobody saw any gambling.

#### Evidence Circumstantial

The prosecution admitted throughout its case that all its evidence was circumstantial.

Judge Tracy found Henry and the rest not guilty because, he said, the prosecution had not established guilt.

\* \* \*

"All the evidence introduced by the government was circumstantial," he told a Star-Bulletin reporter after the trial ended.

\* \* \*

"Circumstantial evidence is not enough in a gambling game. It does not prove the defendants were gambling."

Noboru Nakagawa prosecuted the case for the city-county. Opposing him were Attorneys Samuel

(Testimony of Richard R. Williams.)

Landau, O. P. Soares and William Z. Fairbanks.

### Hite's Comment

The Star-Bulletin consulted Public Prosecutor Charles M. Hite Wednesday afternoon—not for an opinion of the case but for his ideas on circumstantial evidence in general.

“Circumstantial evidence is used daily in all kinds of cases and in all kinds of courts to establish the guilt of a defendant,” Mr. Hite explained.

“It is used daily in felony cases. It is used daily in misdemeanors. Often it is stronger than direct evidence.”

### Other Cases Pending.

But Henry has jumped only one of the legal hurdles in his path. He and 11 others still have a case pending in district court. Under the charges they are accused of being in a barricaded place.

And in the district court, he faces charges of illegally possessing narcotics. Hearing on a motion for a bill of particulars in that case has been set for 10 Friday morning.

Admitted Nov. 9, 1949.

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Q. Who wrote the headline for these articles, Mr. Williams?

A. A person known as the desk man.

Q. I see. Now, both you and the desk man are under the control of the editor of the newspaper?

A. That's correct.

(Testimony of Richard R. Williams.)

Q. And, as a matter of fact, do you know whether or not Mr. Allen rather carefully scrutinizes in the newspaper the statements that are in there?

The Court: Before or after printing? [50]

Mr. Landau: Well, before printing.

A. Well, before they appear for publication, that's true, he does.

Q. Well, now, Mr. Williams, when you published these items, especially the one of September 21st, which was Exhibit No. 1, which had the long list of arrests, you were carrying out orders of your editor, is that correct?

A. No. I believe that I got myself—I went into the Records Bureau of the Police Department and got a list of records of his offenses, wrote the story, and then submitted them to Mr. Allen for approval. And that was the last I saw of the story until it appeared in the paper.

Q. As a matter of fact, didn't Mr. Allen ask you to get that information?

A. No, I don't believe he did.

Q. Let me see if we can—my memory may be poor, but I want to be straightened out on this if I'm wrong. Didn't you and I have a conversation about that and didn't I tell you that in my opinion a statement like that had no newsworthy interest at the moment, and that you replied that I'd have to see Mr. Allen because he's the one that had told you to write it up?

(Testimony of Richard R. Williams.)

A. That's right. It was submitted to him for approval.

Q. But hadn't he asked you to write it up and get the information and write up an article? [51]

Mr. Hoddick: May it please the Court, I will object to the question. First of all, I think that Counsel is cross-examining his own witness, and second of all, I think it is entirely immaterial as to whether Mr. Churchill's arrests in the community were well-advertised or not. It seems to me that whether this publicity stirred up prejudice and resentment against Henry in the community has nothing to do with how it happened to appear in the paper or who approved its going into the paper, or even who wrote it.

Mr. Landau: I want to show, if the Court pleases, that there has been so much of this in the newspaper, with the appellation given to the defendant "Boss of Little Harlem" and "Underworld Character," and so forth, that it has automatically affected the community. And I think it is also important to ascertain just who it was that is responsible for the writing of these articles, whether or not they were passed and approved by the city editor, by the editor, I should say; and to determine whether or not or who in this particular instance of the long list of arrests wanted that article written; to determine its effect on the community; and maybe who is responsible. I don't know.

The Court: Well, interesting though it may be,

(Testimony of Richard R. Williams.)

the other side of it is the important side. Related to your motion, regardless of how it got in the paper, the important thing to you is that it was in the paper and no doubt read [52] by the Star-Bulletin's how many subscribers?

The Witness: 84,000.

The Court: 84,000 subscribers.

Mr. Landau: I think that is all, if the Court pleases.

The Court: Cross-examination?

Mr. Hoddick: No cross-examination.

The Court: You are excused.

(Witness excused.)

### JACK M. FOX

a witness in behalf of the Defendant, being duly sworn, testified as follows:

#### Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Jack M. Fox.

Q. And what is your occupation?

A. I am a news reporter.

Q. With what newspaper?

A. Honolulu Advertiser.

Q. And what particular beat do you cover, Mr. Fox? A. Police District Court, fire.

The Court: Fire?

(Testimony of Jack M. Fox.)

The Witness: Fires that occur in the city.

Q. Part of your duties is to report upon the activities in the Magistrate's Court in Honolulu?

A. That's right. [53]

The Court: Mr. Landau, may I suggest that, similar to Mr. Williams' testimony, if there is something that you want to bring out, something particular, couldn't it be stipulated that these things were published?

Mr. Hoddick: I will stipulate that they were published and consent to their introduction in evidence.

Mr. Landau: All right. Then I think that's all.

Mr. Hoddick: I'd like to have the dates.

The Court: Well, proceed to put them in evidence directly. Exhibit 6 will be—

Mr. Landau: I have, if the Court pleases, a copy of an editorial in the Honolulu Advertiser for August 10, 1949. I was unable to get the paper itself but I made a copy of it this noon at the Advertiser office. If Counsel will kindly permit me to read it in the record—the Court cannot read my handwriting or else I would put it in. This is an editorial comment and I will read it.

The Court: Well, better than that, supposing you have it typed up and supply it.

Mr. Landau: Very well.

The Court: So, subject to check—

The Clerk: Do you want to give it a number now?

(Testimony of Jack M. Fox.)

The Court: We will give it a number, Defendant's Exhibit 6.

(The newspaper item referred to was received in evidence [54] as Defendant's Exhibit No. 6.)

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#### DEFENDANT'S EXHIBIT No. 6

August 10, 1949—The Honolulu Advertiser

##### Ubiquitous Mr. Henry

Mr. Winston Churchill Henry has been entirely too much in Honolulu's police news during the past two years. He has been arrested on eight occasions, charged with seventeen violations of the law. Each time he has quickly been released on bond, many times being re-arrested under conditions that seemed like a resumption of the offenses charged before previous accusations against him have been disposed of by the courts.

He has paid one fine of \$10.00, delayed another of \$200.00 by a notice of appeal. He has been sentenced to two terms of sixty days in jail, with subsequent suspended sentences of thirteen months, and regained his liberty on bond by notice of appeal.

His first arrest here—his record shows seventeen prior arrests on the mainland—was two years ago, August 25, 1947, on a charge of "soliciting." Five months later the case against him was dropped by a "nolle prosequi," unwillingness to prosecute.

(Testimony of Jack M. Fox.)

Police records indicate evidence that marked money given to him was found shortly thereafter in a woman's possession.

Since then he was found guilty of assaulting policemen, was the central figure in five raids on barricaded premises at Waikiki and on a woman's abode on Hausten Street. Narcotics, gambling devices, illicit firearms, women were found by the raiders. Each time Henry was freed on bond. He is at liberty now after arrest early Sunday morning.

This man stands convicted of assaulting policemen. He is found repeatedly in situations that require his arrest. Yet he manages to stay in circulation. To the layman it appears that his innocence or guilt should be established within the shortest possible time, and that in the meantime some way might be found whereby the police can account for all his actions at all times.

Whatever the technicalities of the law may be, Winston Churchill Henry has shown without question that he contributes nothing to the social and moral welfare of Honolulu.

Admitted Nov. 9, 1949.

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Mr. Landau: I have here a page from the Honolulu Advertiser, September 28, 1949, an editorial entitled "Mr. Henry Is Out Again."

The Court: Exhibit 7.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 7.)

(Testimony of Jack M. Fox.)

DEFENDANT'S EXHIBIT No. 7

The Honolulu Advertiser

[Masthead.]

Wednesday, September 28, 1949

Mr. Henry Is Out Again

Once more Mr. Winston Churchill Henry has beat the rap. Once more the City and County Prosecutor's office has refused to proceed against this man, arrested eight times on charges of seventeen violations of the law, when time came for his trial. The people of Honolulu are not likely to find even the slightest satisfaction in the statement of the prosecution that illness of its chief witness, Police Officer Frank Anderson, excused its inaction. Mr. Anderson reported for work on the afternoon of the day the trial was to be held.

Whether Police Officer Anderson was available or not, the prosecution has thus far given no reason why the trial should not have gone forward. Several officers, including a Federal narcotics agent, were present when Henry was arrested nearly five months ago on a charge of being in a barricaded place. For some reason, best known to Prosecutor Hite's office, only two of them were subpoenaed as witnesses. Others were available, even at this late date, if the prosecutor had seen fit to call them.

Five months is a long time for a trial in police court to be delayed. It would seem that so long a wait would tend to obscure evidence rather than strengthen it. But the records indicate that long

(Testimony of Jack M. Fox.)

waits are customary in cases involving Mr. Henry, who has been charged with various offenses involving narcotics, women, illicit firearms and an assault upon a policeman, yet has managed to remain at liberty on bond.

The public is entitled to more definite action in the matter of Mr. Winston Churchill Henry. It looks to Public Prosecutor Hite for that action. The situation is of too great community concern to be left to underlings.

Admitted Nov. 9, 1949.

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Mr. Landau: I have here the Honolulu Advertiser of Sunday, October 16, 1949, in Letters to the Editor, rather letters from the people to the editor, entitled, "Who Is Behind Henry?"

The Court: Exhibit 8.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 8.)

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#### DEFENDANT'S EXHIBIT No. 8

The Honolulu Advertiser  
Sunday, October 16, 1949

Who Is Behind Henry?

Editor The Advertiser:

On the front page of The Advertiser this morning we read of the arrest of a twenty-six-year-old taxi

(Testimony of Jack M. Fox.)

driver for selling two marijuana cigarettes. The vice squad chief announces that this is the opening of a drive against taxi drivers suspected of selling narcotics. I am wondering if Neal Donohue thinks that it is worth while arresting a man for selling only two marijuana cigarettes. Surely he must realize that he is wasting his time since one Winston Churchill Henry has been arrested several times this year. He has been in a barricaded place along with his guests or clients, liquor served from a well stocked bar has been found, evidences of gambling and not only two little marijuana cigarettes have been found in Henry's house but large quantities of drugs, some of them buried in the garden.

This man Henry does not belong here but is from the Mainland and still at large.

Perhaps this taxi driver will receive the same lenient treatment and I shall be extremely interested to see whether this is the case or not.

Once more I ask who and what is behind Henry?

Oct. 11.

PETER P. SHAW.

Admitted Nov. 9, 1949.

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Mr. Landau: The newspaper for Tuesday, November 8, 1949, if the Court pleases—

The Court: What was the date?

Mr. Landau: November 8, 1949, entitled "Henry Gets Off Again For \$25."

(Testimony of Jack M. Fox.)

The Court: Nothing in the paper today?

Mr. Landau: I haven't seen today's paper, Judge. I'd like to call the Court's attention to this article which has a nice big black headline.

The Court: I broke my glasses yesterday. I didn't read the paper last night, which is the truth.

Mr. Landau: Plainly enough, if the Court pleases, I think the witness, Mr. Fox, I don't know whether he will agree with me or not—oh, well, it doesn't matter—withdraw that.

The Court: That last exhibit becomes No. 9.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 9.)

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#### DEFENDANT'S EXHIBIT No. 9

The Honolulu Advertiser  
Tuesday, November 8, 1949

#### Henry Gets Off Again For \$25!

Winston Churchill Henry, 35-year-old Negro, and 22 others pleaded nolo contendere to charges of being in a barricaded place, were found guilty, and each was fined \$25 Monday by District Judge Millard D. White.

The case, concerning a raid on the Henry residence at 408 Keoniana St., May 8, originally came before the court on Sept. 27.

At that time the government nolle prossed the

(Testimony of Jack M. Fox.)

charge saying that the star prosecution witness was absent.

\* \* \*

Those who paid fines, in addittion to Henry, were Helen Thomas, 29, 408 Keoniana St.; Irma Talley, 26, 805 Kinau St.; Lillian Evans, 27, 2562 Date St.; Thomas Sanders, 1508B Emma St.; Harold Reed, 36, 2239 N. School St.; Charles L. Nelson, 36, 2239 N. School St.; Oliver M. Lonon, 26, 1508 Emma St.

Roy H. Saunders, 55, Leonard Hotel; Walter B. Mays, 36, Damon Tract; Gerald F. Warner, 36, 2019 Puowaina drive; Claude Williams, 27, Damon Tract; Kenneth Valley, 1736-D Kalakaua Ave.; Orestes Cavness, 25, 1170 Smith St.; Alvin G. Garrett, 35, 2562 Date St.; Jerry Jones, 26, 80 S. Beretania St.; Marian Morichika, 32, 1546 Magazine St.

\* \* \*

Rhemus Fales, 32, 411 Hobron Ln.; Kershaw Weston, 27, 411 Hobron lane; Richard Harris, 27, 130 Kealohilani Ave.; Andrew Warner, 37, 2019 Puowaina drive; Audrey Cole, 28, 2019 Puowaina drive; Eugene Wallace, 30, 3237 Nimitz highway; Gazella Mitchell, 26, 2239 N. School St.

Admitted Nov. 9, 1949.

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The Court: Well, I have got to adjourn for the day at this time. I planned to go forward with

your Woolley case tomorrow afternoon, but I guess we had better finish this up. I hear tell you are going somewhere soon, Mr. Hoddick.

Mr. Hoddick: I am, your Honor. The only thing that I have in mind is that I have three witnesses that I asked to come in. I don't think it would take more than five minutes to take the testimony of all three of them, if we can put it in.

The Court: I'm sorry but they will have to come back tomorrow at two.

Mr. Landau: Your Honor has a case in the morning?

The Court: Yes.

Mr. Landau: Two o'clock?

Mr. Hoddick: Your Honor, I have an engagement over in the Circuit Court before Judge Towse on a tax matter in which the United States is involved, at two o'clock. How much longer will you take, Mr. Landau? [56]

Mr. Landau: I have one more witness.

Mr. Hoddick: I will arrange for somebody else to go over there.

The Court: All right. Two o'clock.

(The Court adjourned at 3:55 p.m.) [57]

November 10, 1949

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, and Criminal No. 10,254, United States of America vs. Winston Churchill Henry and Kershaw Weston, for further

hearing on motion to transfer case from the District of Hawaii.

Mr. Landau: At this time, if the Court please, I would like to introduce in evidence typewritten copy of the editorial which appeared in the Honolulu Advertiser August 10, 1949.

The Court: We saved space for that, as Exhibit 6.

Mr. Landau: That's right.

The Court: Subject to check—or has it been checked

Mr. Landau: It has not been checked.

The Court: Subject to check, it may be received.

(Thereupon, the document above referred to was received in evidence as Exhibit 6.)

Mr. Landau: Actually, Counsel will have to go over to the Advertiser to check it. He will just have to take my word.

Mr. Hoddick: I assume that it is a correct copy.

The Court: Next witness.

### ARTHUR McGRAW

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

### Direct Examination

By Mr. Landau:

Q. What is your name?

A. Arthur McGraw.

Q. Where do you reside, Mr. McGraw?

(Testimony of Arthur McGraw.)

A. Kaneohe Tract on the other side of the Island.

Q. And how long have you been a resident of the city and county of Honolulu?

A. Four and a half years.

Q. What is your business?

A. I am a property owner and property manager.

Q. Mr. McGraw: You were here in Court yesterday as a spectator? A. Yes, sir.

Q. And at the close of the hearing did you come to me and volunteer some information?

A. Yes, sir.

Q. As a result of that information I have asked you to appear again today? A. Yes, sir.

Q. You do know Mr. Henry, the defendant in this case, don't you? [59] A. Yes, I do.

Q. Now, Mr. McGraw, in the last two or three months have you heard remarks being made, or been in conversation with people, concerning these cases? A. Yes, sir.

Q. Will you tell the Court, to the best of your recollection the conversations that were had and the statements that were made that you heard concerning these cases?

Mr. Hoddick: We object, your Honor, on the grounds that anything the witness says will be hearsay and the Government will be deprived of the opportunity to cross-examine people who made the statements.

The Court: It is probably true. I am going to overrule the objection, however, to be consistent.

(Testimony of Arthur McGraw.)

Q. (By Mr. Landau): Do you remember the question?

A. I have talked to a great many people, probably in most walks of life, and it just struck me as peculiar that there is no other white man who would come up here and testify that they were not prejudiced. I have a feeling I know a little bit about human relations; most people think with their hearts instead of their head. I feel that if I was on a jury—

Q. That isn't the question, Mr. McGraw. Have you heard statements that were made in your presence? A. Yes, I have. [60]

Q. What were those statements and remarks that were made?

A. I will start this morning. In fact, here is a card of the man I talked to. I was curious. This man is a salesman and he wanted to sell me something today. I told him I had to go to court, I was going to a very interesting case. He asked me which one it was, and I informed him it was this case, Winston Churchill Henry case. And he said "Oh, that is the fellow that sells marihuana cigarettes." I think that is prejudice right there. So I got a little curious, and I asked him some more questions, and I definitely asked the man, would he be prejudiced, and he said, "Well, I think I would, like most other people."

I said, "Well, what type of people do you think would make up a fair jury?"

(Testimony of Arthur McGraw.)

He says, "Well, you would probably have to find people like himself to be fair, give him a fair trial." In fact, the only—if I try to recall what he said. He said, "The only fair trial would be his own kind, that would be only fair to him," referring to Mr. Churchill, or Mr. Henry.

And the other party—do you want the names of these people that I spoke to?

Q. You don't have to give them now.

A. I will be glad to. Yesterday I happened to hear on the names, so I will give him all the names he wants. [61]

The next man I spoke to is a tavern owner. Although he tried to hide the fact that he would try to give the man a fair trial, he replied, "It would be a Southern trial, a man given a fair trial and then hanged, that idea in mind," but he definitely stated he would be prejudiced. That man's name is Johnny, I think Welch, or Walsh. He owns the Tavern on Hotel Street.

The other man I talked to was a man named Brock or Borck. He owns an amusement center. And he definitely said that he was prejudiced.

The other man I talked to is a man by the name of Mike Shapiro. He is a general salesman. Oh, he handles novelties, jewelry of all sorts, diamonds and that sort of thing, and he definitely made a statement that he was prejudiced, that he would not like to be on a jury, because he mentioned the fact about Will Rogers, "The only thing I know is

(Testimony of Arthur McGraw.)

what I read in the paper." And that seems to be the impression that I had yesterday, most of the people I talked to in the past.

Q. Well, are there any other remarks from people whose names you may not remember, Mr. McGraw?

A. Oh, definitely. There are any number of people that I don't even know who they are. The reason I have heard so much about this is simply the fact that I have a leasehold on a large building in what is known, according to the papers, as "Little Harlem," and, of course, most of my friends know I have the building down there and razz me about this particular case. They see it in the paper, and all that sort of thing, so I am more or less like that prize fighter's manager yesterday; people do ask me about the case.

Well, anything I know about the case would be this, that I myself, I know the man, but I would be prejudiced myself. I feel that I would not like to serve on a jury with people, because I definitely feel that they are prejudiced. A man may come into court not prejudiced and then can be made prejudiced by the evidence in court; I can understand that, but when a man comes in ahead of time and feels he is prejudiced against the man, I don't feel that is putting the law on its highest plane by not giving this man consideration——

Mr. Hoddick: One second. Your Honor, Mr. McGraw made the statement he felt other people

(Testimony of Arthur McGraw.)

were prejudiced. I move that that be stricken from the record on the ground that that is the issue that your Honor is called upon to decide. You can listen to the evidence, from which the inference might be drawn that other people are prejudiced, if there is prejudice in the community. It certainly isn't up to this witness.

The Court: He has been allowed to state his opinion over your objection. I will deny your motion to strike.

Q. (By Mr. Landau): Do you have knowledge or information about any other remarks or statements having been made [63] or passed in your presence, Mr. McGraw?

A. Well, as I mentioned before, I hear so many comments that I now just ignore them, but in yesterday's case the prosecution wanted names, so definitely I came today prepared to give you the names of people, because I feel that is his justification that he should have that to check on if he so desires. But there have been any number of people. I would safely say I have talked to and overheard at least 75 or 100 people.

Q. In the past two or three months?

A. Yes.

Q. And what was the nature of their remarks to you?

A. Well, it is just that most of them feel the man is guilty, he should be sent to jail. That is the nucleus of the whole thing.

(Testimony of Arthur McGraw.)

Q. In other words, you say that they have prejudged the man?

A. I would say that, yes.

Q. Irrespective of what the evidence may produce; is that correct?

A. I feel that they would be prejudiced, yes. In other words, from their conversation they implied that they are prejudiced. I wouldn't say they said they were prejudiced, except the ones I mentioned, but their conversation would lead anyone listening to it to feel that they were prejudiced. [64]

Q. You have inferentially answered this question, but I will ask it directly. In your opinion, Mr. McGraw—

Mr. Landau: Strike that.

Q. (By Mr. Landau): Do you, from these conversations that you have had, these statements that have been made in your presence, have an opinion as to whether or not there is prejudice in the community against the defendant as to these cases?

Mr. Hoddick: I make the same objection to that question as I did previously.

The Court: Overruled.

A. As an individual I definitely say there is prejudice, not only on my own part, but on the part of the people I have overheard discussing this case.

Q. (By Mr. Landau): And you believe that there is prejudice in the community generally, Mr. McGraw?

A. I am definitely surprised that there aren't

(Testimony of Arthur McGraw.)

more so-called haoles that haven't come up here to testify on this—in fact, that is the reason I have come up here, because from the display of witnesses that were here yesterday, evidently people just don't have—excuse the word—guts to come up here. I have no sympathy with what the man may be accused of. My sympathy is with the fact that this man should be given full consideration of the law and I believe I agree with the item in the local newspaper the other day, which we must all believe [65] in. I have forgotten who it was, but he said: A law is put on its highest plane if and when a man is given fullest consideration if and after all the evidence has been put against him.

Mr. Landau: Your witness.

#### Cross-Examination

By Mr. Hoddick:

Q. Mr. McGraw, you say you know Winston Churchill Henry?

A. I have known him a good long time as "Shorty." I didn't know the man as Winston Churchill Henry. I didn't know him as that until I would say the last two months.

Q. How did you happen to meet him?

A. I mentioned I own property on Smith Street, and colored people hang on Smith Street. He walked by there without knowing then this man, knowing his name, but, you know the individual.

Q. Has Henry rented property from you?

(Testimony of Arthur McGraw.)

A. No, sir.

Q. Have you had any business dealings with him? A. No, sir.

Q. Have you had dealings with friends of his?

A. I don't know whether it is friends; people on Smith Street have dealt with me there, yes.

Q. Other colored people? [66] A. Yes.

Q. Now, when did you have this conversation with Johnny Welch concerning prejudice in the community against Winston Churchill Henry?

A. This afternoon.

Q. That was this afternoon?

A. Yes. In fact two of these people, the salesman whose card appeared here and Mr. Welch. In fact, I just had a discussion with them over a cup of coffee about three-quarters of an hour ago.

Q. Where, in his tavern?

A. No, in a restaurant.

Q. What restaurant?

A. I don't know what name it is. Across the street from the Trade Winds on Hotel Street.

Q. And how about Mr. Brock? When did you speak to him?

A. I would say about three or four weeks ago.

Q. Did he bring up the subject or did you?

A. Well, he knows—He is a property owner on Hotel Street and he knows I have one property on Smith Street. That is how the question came up. They razz me about it.

Q. How about Mr. Shapiro? When did you see him?

(Testimony of Arthur McGraw.)

A. I saw him—I think the question came up about a week ago. [67]

Q. And where did you speak with him?

A. At his shop. He also has a shop on Hotel Street.

Q. Where is that located?

A. That is 35, I think, North Hotel Street. I think that is the address of the place.

Q. You have stated that you yourself would be prejudiced. Is that prejudice based on what you read in the newspapers?

A. Yes, I would say that 75 per cent of it is. The other would be hearsay from what I have heard from other people.

Q. And if you were called in here to serve on a jury and you were asked whether you could grant a man a fair and impartial trial, what would your answer be?

Mr. Landau: Just a moment, Mr. McGraw. I object to it, if the Court please. The individual belief of the witness is immaterial, whether he actually would or would not be prejudiced. It is a question of general prejudice in the community.

Mr. Hoddick: I think Mr. Landau mistakes the conversation proposition for the basic one. The Court can infer, if it is shown that there is general prejudice in the community, that a man cannot get a fair trial, but if it can be shown that he can be given a fair trial, the question of whether there is some prejudice is immaterial.

(Testimony of Arthur McGraw.)

Mr. Landau: We would have to question 530,000 people, if the Court please.

The Witness: Your Honor, could I answer that question?

The Court: Not at the moment. The only purpose that I can see that this question might have in this setting would be as to whether or not this man understands the nature of the condition of process, but as to whether he would be a qualified juror, if called, is not the question.

Mr. Hoddick: I am not asking if he would be a qualified juror, but whether, given this prejudice, he could take a seat in the jury box and cast his vote on the guilt or innocence of the man solely on the basis of the evidence adduced in court. After all, the strength of the prejudice has something to do with it, as well as the existence of the prejudice, whether he thinks that prejudice is so strong that regardless of the evidence he heard in court he would still have to return a verdict of guilty.

The Court: Again, I don't think at this point it is a question of whether this man would qualify if he were duly selected and summoned as a juror, but your question may have relevancy as to whether or not he understands what he has testified to.

Mr. Hoddick: That I also had in mind.

The Court: On that latter basis, and on that alone, you will be allowed to ask the question. [69]

Mr. Hoddick: Will you repeat the question, please.

(Testimony of Arthur McGraw.)

The Witness: You asked the question, I think—

Mr. Hoddick: I am asking the reporter.

(Question read.)

Mr. Landau: Do I understand that question is being permitted to test the man's credibility?

The Court: I think it ought to be rephrased, because, as worded, it directly relates to what I have ruled out. Rephrase your question.

Q. (By Mr. Hoddick): Mr. McGraw, you have stated that you have a prejudice against the defendant, Henry, by virtue of what you read in the papers and because of the things you have heard other people say. Is that prejudice so strong that it would influence you in determining Henry's guilt or innocence of the charges brought against him?

Mr. Landau: Object to the question, if the Court please, in that it is now singling out one man's prejudice, rather than the general prejudice.

Mr. Hoddick: How can you distinguish between one man's prejudice and the general prejudice? This man is part of the community.

Mr. Landau: Very simple. We don't say there are 530,000 people in the community who are prejudiced against him, but we are saying there are so many of them there is general prejudice. [70]

Mr. Hoddick: You say there are 50 men in the community or 75 men, by virtue of what this man tells us, who are prejudiced. But why isn't it proper for us to show that there are certain members of this community who are not prejudiced who have

(Testimony of Arthur McGraw.)

read the paper; and isn't it all the stronger if this man, who has talked with people who he believes are prejudiced, is not so prejudiced that he couldn't grant the man a fair trial.

The Court: I don't believe individual cases or instances on this point are going to be helpful. I think I have indicated I would allow your question only as to whether or not in relation to what he has testified to he understands the nature of the judicial process sufficiently to warrant a conclusion which he reaches. The fact that he may or may not be prejudiced and wouldn't be for that reason a juror who would be accepted in point of law, or whether fifty-nine others would or wouldn't be, is not the question at this stage. The question that we are concerned with is whether or not there is such a general prejudice in the community that it is unlikely that there could be selected twelve fair and impartial jurors that would give this defendant a fair trial in the cases that are pending in this court.

Mr. Hoddick: I have no further questions.

Mr. Landau: That is all, Mr. McGraw. Thank you.

The Court: Excused. [71]

(Witness excused.)

Mr. Landau: I am waiting for Mr. Berman who was supposed to be here at 2. I want to check outside.

## WINSTON CHURCHILL HENRY

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

'The Clerk: Just sit down, please.

Mr. Landau: For the purposes of the record, if the Court please, we are putting on the defendant himself just for this purpose and for no other.

## Direct Examination

By Mr. Landau:

Q. Your name is Winston Churchill Henry?

A. That's right.

Q. Would you talk loud, Mr. Henry.

A. That's right.

Q. And you are the defendant in these two cases?

A. I am.

Q. Now, you understand the matter that is before the Court is to determine whether or not there is general prejudice in the community against you?

A. I do.

Q. Mr. Henry, in the past two or three months has anything been said to you or of you in your presence that would enable you to arrive at an opinion as to whether or not there is or is not prejudice against you? [72] A. It have.

Q. Would you tell the Court the incident or incidents which cause you to arrive at that conclusion.

A. Well, from time to time that I have been talking with people who did not know that I was

(Testimony of Winston Churchill Henry.)

Winston Churchill Henry who have made remarks about what should be done, and if they were to serve as a jury or had anything to do with deciding of justice in my case, that what they would do, although at the time these people didn't know that I was the fellow who they was making the remark about.

Q. Did anybody in your presence, not knowing who you were, or perhaps even if they knew who you were, make any remarks to you about Southern justice or Texas justice?

A. Well, they seemed to think that I should enter some institution or penitentiary without a trial.

Q. Can you quote the words, or is that your impression from the words that were used?

A. Well, that was practically the words that was used, that they don't think that a fellow as Winston Churchill really should have a trial.

Q. Does that come from people of your race or people of other races?

A. Well, there was a few of my race and quite a few other races.

Q. Now, Mr. Henry, have you ever been the object of [73] sightseeing expeditions?

A. (Laughing): Yes, I have had people to come from the 1170½ Smith Street to 1182, wants to know who is this notorious character Winston Churchill Henry.

Q. People you say have come down to see who you were? A. That is correct.

(Testimony of Winston Churchill Henry.)

Q. Now, in your opinion, Mr. Henry, do you feel that if you were tried by a jury in this district that you would be able to get a fair and impartial trial? A. I do not.

Mr. Hoddick: I will object to that, first of all, that there is no showing of the fact that the witness on the stand has an understanding of what a fair and impartial trial is, not competent to answer the question; and again the witness is deciding what the Court is called upon, upon a hearing of this motion, to decide.

Mr. Landau: I will withdraw the question.

The Court: The answer may be stricken.

Q. (By Mr. Landau): Let's put it this way: Do you feel, from the statements that have been made in your presence and to you and the fact that you have been the subject of some of these sightseeing trips by people, that you could render an opinion as to whether or not there is or is not prejudice in the community? Just answer "yes" or "no."

A. Well, I would say that there is prejudice, yes. [74]

Q. Just answer the question "yes" or "no," Mr. Henry. Do you feel that you could render an opinion as to whether or not there is or is not prejudice? A. Well, yes, there is.

Q. Could you—

Mr. Landau: I know there will be an objection to the next question, your Honor, and I want to give Counsel an opportunity to object.

(Testimony of Winston Churchill Henry.)

Q. In other words, you feel that you could render an opinion as to whether or not there is prejudice? A. Yes.

Q. All right. Now, in your opinion, do you feel that there is or is not prejudice against you in this community?

Mr. Hoddick: I will object to that on the same grounds as I just stated.

The Court: Overruled.

Q. (By Mr. Landau): What is your answer to that question? A. Yes.

Q. You feel that there is? A. Yes.

Mr. Landau: Your witness, Mr. Hoddick.

Mr. Hoddick: No questions.

Mr. Landau: Step down.

The Court: Excused.

(Witness excused.) [75]

### MARY NOONAN

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

### Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Mary Noonan.

Q. And where do you reside, Miss Noonan?

(Testimony of Mary Noonan.)

A. Pukalani Place, Kaimuki.

Q. And are you employed in Honolulu?

A. Yes, I am.

Q. In what capacity, Miss Noonan?

A. As director of the Civic Forum and executive secretary of the Republican Club.

Q. Now, Miss Noonan, in your word have you had occasion to hear, within the past two or three months, remarks or statements concerning the defendant Winston Churchill Henry? A. Yes.

Q. And can you tell me whether those were few or many? A. I would say many.

Q. Many. Now, Miss Noonan, would you tell the Court the tenor of those remarks or statements that were made concerning this defendant?

A. They had to do with the moral value—concerning what [76] did you say?

Q. Mr. Henry.

A. It was more with the case of Mr. Henry. It had to do with the moral values, as opposed to legal values.

Q. And what was the nature—

Mr. Hoddick: Excuse me. Will you repeat that answer, please, Miss Noonan. I didn't get it.

The Witness: They had to do with moral values of the case as opposed to legal values.

Q. (By Mr. Landau): Would you explain and elucidate a little more, Miss Noonan?

A. They were to the effect that—I don't want to give the wrong impression, but to the effect that

(Testimony of Mary Noonan.)

there was wrong and it didn't matter what the law provided, it was wrong regardless of the provision of the law.

Q. Well, now, were there any remarks made to you about the manner in which this case, or these cases, should be disposed of?

A. I don't think—the manner did you say?

Q. Yes. In other words, I am thinking, was any remark made to you about Southern or Texas justice, using that phrase, or phrases that meant that?

A. No.

Q. When you say "with reference to the moral values as distinguished from the legal values of the case," can you [77] remember any particular phraseology or words that were used by some of these people, so that we can understand you?

A. Yes, one had to do with crime such as this was worse than Communism. Another had to do with that it didn't matter what the—it didn't matter—well, the exact words were: It didn't matter what the law provided, it was wrong before it started; therefore people like this should not be defended or brought to court, that it was just wrong.

Q. In other words, people that were charged with this type of offense shouldn't be given the opportunity of being tried, but should be punished immediately; is that correct?

A. Yes. Perhaps I could express it better by repeating portions of the conversation in which it was suggested by someone that if the law was wrong,

(Testimony of Mary Noonan.)

that the way to take care of it was to get the law changed, but that the person being tried should be tried under the existing law rather than by opinion.

Q. I didn't get that.

A. In a conversation in which they were discussing the rights and wrongs of this particular case, one person brought out the fact that it was wrong. Someone said, but the law provided that he be given a trial, and the phrase used "within the skeleton of the law," he should be given all the justice that was due him. I am trying to use the phrases I have heard. The person who seemed to be of a prejudiced mind felt that [78] that didn't matter: regardless of the law, people, or cases like this, should not be tried. Then the other person came back and said: "Why not? If you think they shouldn't be tried, shouldn't you change the law rather than judging the person under a law that does not exist or under your own opinion?" And those were the phrases that I heard.

Q. In other words, it was a conversation between two people. One person said we shouldn't even bother trying this man and the other person said, well, as long as the law says we have got to try him, we should; is that correct? A. Yes.

Q. Do you remember any other conversations, Miss Noonan, or statements made concerning this?

A. There were conversations regarding it. Many people felt that all the publicity in this particular case was so much greater than generally speaking

(Testimony of Mary Noonan.)

that that also was an indication of that the trial should not go on further.

Q. What does that mean? That he should be punished without trial, or that he shouldn't be tried here?

A. I don't know what it meant. I am only repeating the phrases or expressions I have heard.

Q. Do you remember any others, Miss Noonan?

A. I don't think so.

Q. Beg pardon?

A. No, I don't think I do. Most of them have been [79] centered on this "right and wrong regardless," and they have been general conversations.

Q. Well, now, from these general conversations, Miss Noonan, are you in a position to be able to give this Court—and the answer is just "yes" or "no" at this time—an opinion as to whether or not there is prejudice in the community against this defendant? A. Yes.

Q. In your opinion, Miss Noonan, will you tell us whether or not there is or is not prejudice in the community against this defendant? A. Yes.

Q. You believe that there is prejudice?

A. Yes.

Mr. Landau: Your witness.

#### Cross-Examination

By Mr. Hoddick:

Q. That is, Miss Noonan, you believe there are

(Testimony of Mary Noonan.)

people in the community who are prejudiced against the defendant? A. Yes.

Q. And is it not also true that from these conversations that you overheard it is your opinion that there are people in the community who are not prejudiced?

A. Yes, I think that would be a fair statement.

Mr. Hoddick: No further questions. [80]

The Court: I have a question to ask. Do you know, personally, what this defendant is charged with in this court?

The Witness: No, I don't, in detail, just generally what I have heard discussed.

The Court: Generally what do you think he is here charged with?

The Witness: I have heard he is charged with dealing in traffic with women and in drugs.

The Court: Do you know whether or not the people who voiced these opinions you have just testified to knew what he was charged with in this court in these two cases?

The Witness: I would have no way of knowing that.

The Court: Thank you.

#### Redirect Examination

By Mr. Landau:

Q. Miss Noonan, as a matter of fact, you and I did not speak to each other about this case; I did not question you before I put you on the stand at all? A. No.

(Testimony of Mary Noonan.)

Recross-Examination

By Mr. Hoddick:

Q. One further question, Miss Noonan. You said this conversation you heard was in reference to a particular case. Did you mean the case here in Federal Court, or did you mean the case in the Territorial Court where the prosecution, I [81] believe, was unable to produce a witness one day and it had quite a bit of publicity in the paper? Do you remember what case it was?

Mr. Landau: Pardon me, Counsel. The witness has testified that it was dealing in narcotics, traffic in narcotics, and of course that is a Federal case, not a Territorial case.

The Court: Previously she mentioned in her direct testimony about the case.

Mr. Landau: I had limited my questioning, in accordance with your Honor's suggestion yesterday, to the cases that are in this court.

The Court: I know you did, but I want to find out if she knew what you were talking about. Now Mr. Hoddick wants to know if the people she referred to as talking about the case had some particular case in mind. You may answer the question.

The Witness: I wouldn't know what they had in mind. I only know the general tone of the conversations and the phrases that I have repeated and from what I told you,—

Mr. Hoddick: That is all right. No further questions.

The Court: All right. Thank you.

(Witness excused.)

Mr. Landau: May we have a five-minute recess. I am waiting for one witness who is in the Territorial Court. [82]

The Court: All right, we will take a short recess.

(Recess had.)

Mr. Landau: I am sorry, if the Court please, my witness has not yet made an appearance, and rather than delay this case any longer, I will rest at the moment.

The Court: Very well. Does the Government have evidence to present?

Mr. Hoddick: May it please the Court, this might be an opportune moment, before putting on any evidence, to show that the motion should not be granted. I will call the Court's attention that all of the evidence put on by the defendant in this case so far on the hearing on this motion is speculative as far as the question of whether an impartial jury could be selected from the community or not, and with reference to that I call the Court's attention to the last used Eisler case.

The Court: Well, let's argue the matter later, unless this has some relevancy to what you are going to put on as evidence.

Mr. Hoddick: May it please the Court, what I had in mind was if you adopt that opinion, it will not be necessary for us to put on any evidence.

The Court: You never can tell what I am going

to do. You make up your mind as to whether or not you are going to put on any evidence. [83]

Perchance, is the person who just walked in the room your witness

Mr. Landau: No, your Honor. He is a member of the Bar.

Mr. Hoddick: I will call Mr. Lansing to the stand, please.

### NELSON BAKER LANSING

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down.

### Direct Examination

By Mr. Hoddick:

Q. Will you give your full name, please.

A. Nelson Baker Lansing.

Q. And where do you reside, Mr. Lansing?

A. 2711 Nuuanu.

Q. And how long have you been in the Territory of Hawaii? A. Since July 31, 1883.

Q. What is your business at this time?

A. Real estate salesman.

Q. Have you read about the defendant in this cause, Winston Churchill Henry?

A. I have read something about him.

Q. That is in the newspapers? [84]

A. In the newspapers, yes.

(Testimony of Nelson Baker Lansing.)

Q. And were those articles which you read antagonistic, would you say, toward Mr. Henry?

A. I wouldn't say so.

Mr. Landau: I object to the question. For the purposes of the objection may the answer at least be suspended.

The Court: All right.

Mr. Landau: The fact that he has read some articles which may not have been discriminatory or otherwise against the particular defendant is immaterial. The question is: Has he read all the articles? At least, I mean, if he is going to go into that question at all.

The Court: He is answering questions that are asked of him. You can ask him that.

Mr. Landau: I want to object to the question, if the Court please, on the ground it has no relevancy or materiality in this issue.

The Court: If it doesn't cover all the articles that have been written, I think you can cover them.

Mr. Hoddick: Your Honor, was the objection overruled?

The Court: It is overruled. The answer may come in.

Q. (By Mr. Hoddick): Were the articles which you read, Mr. Lansing, friendly to the defendant, Mr. Henry? [85]

A. I just think they are just a matter of news. I wouldn't say they were one way or the other.

Q. On the question of whether the defendant,

(Testimony of Nelson Baker Lansing.)

Mr. Henry, is guilty or innocent of the charges now pending in this court, have you been influenced by the articles which you read?

Mr. Landau: I object to it, if the Court please, on the ground it is incompetent, irrelevant, and immaterial. We don't know what articles he has read. We don't know whether he has read them all. What he would do as an individual is immaterial, whether he has been influenced by it, if the Court pleases. We are talking about a generality. I think that is the only issue. Is there in this community a feeling of prejudice, not what isolated individuals would feel like.

Mr. Hoddick: May it please the Court, the basic issue is: Can we select a jury of twelve men in this community with sufficient ease to warrant having the case tried here so that the case would not be removed? Mr. Landau has endeavored to show that cannot be done by bringing in people who have testified to statements they have heard other people make and on the basis of conclusions which they have drawn from the statements other people make, and from that we are to infer we cannot select such a jury. Why can't this Court infer from the fact that I can produce people in [86] court who can state they can serve as fair and impartial jurors, or that they have no prejudice against Henry as a result of these newspaper articles, or anything else they have heard about him, and from that give your Honor an opportunity to fairly judge whether a jury can be selected or not?

(Testimony of Nelson Baker Lansing.)

The Court: That isn't the question at this stage. The question is simply whether or not there is generally in the community a body of people who are not prejudiced from whom a jury can be selected. The fact that this man is personally testifying, or would testify, that he isn't doesn't establish that there is a substantial body of citizens who are not prejudiced.

I will let you bring out testimony just generally on the subject of a sizable portion of the population being not prejudiced, just as I allowed him to show that, according to his witnesses, there was a sizable portion of the population who were prejudiced.

Mr. Hoddick: Your Honor, the defendant has perhaps shown, or at least there is some basis perhaps for feeling, that maybe 120 people, if that many, felt a prejudice against the defendant. Why can't the Government come in here with 120 people, or 150 people, and show that they are not prejudiced. There is no question of inference there. It is a matter of fact.

The Court: Simply because I won't let you do it; that is the reason. We won't get down to individual cases. We are talking generalities. I won't let you put on specific individuals to testify that they are or are not prejudiced because they are not being called as jurors. The question is: Is there not such a prejudice in the community that this man cannot be given a fair trial in these cases? That is the question.

(Testimony of Nelson Baker Lansing.)

Mr. Hoddick: And, your Honor, isn't it proper for us to put on specific persons to testify that they are not prejudiced so that you know that that much prejudice does not exist?

The Court: I don't think so, any more than I would allow Mr. Landau to bring in 59 people to say they were prejudiced. It would become a question of a contest of who could bring up the most individuals and "trot" them into the court room.

Mr. Hoddick: The question is whether with reasonable facility a fair and impartial jury can be drawn. It is a question of how widespread the prejudice is.

The Court: Regardless of how you feel on it, I am not going to let you get down to specific cases.

Q. (By Mr. Hoddick): Have you discussed this—

Mr. Hoddick: I would like to make one further comment for the record.

The Court: Yes. [88]

Mr. Hoddick: Apparently Mr. Landau is building his motion on two facets. One is widespread newspaper publication from which he would have your Honor infer that most people have read adverse comments about Mr. Henry and therefore must be prejudiced, whether they could testify to that fact or not from the stand as individuals; and, second, that there does exist a prejudice in the community which can be inferred from statements which these people made to the witnesses which he called.

(Testimony of Nelson Baker Lansing.)

And as far as the effect of the newspaper publicity in the community is concerned, I think it is only proper to ask the individual witness how he has been affected by such newspaper publicity. It hasn't been covered by statements made to the witnesses which Mr. Landau put on the stand.

The Court: The question is still the general effect of those newspaper publications upon the community as a whole. If this man has circulated in the community to the extent that he can feel the temper of the times with reference to this subject, I will let him testify, but the fact that he may testify that in having read these articles he is affected one way or the other doesn't help me at all.

Q. (By Mr. Hoddick): Mr. Lansing, have you discussed the cases which have been publicized in the newspaper concerning Mr. Henry with other people?

A. Well, we have at lunch time, yes.

Q. With divers other persons? [89]

A. Yes, a number of other persons.

Q. And where do you usually take your lunch?

A. Capitol Restaurant.

Q. From your conversations with these other people do you think that you are in a position to testify as to whether prejudice exists in this community or not against the defendant?

A. As far as my circle is concerned, yes.

Q. And do you think that prejudice does exist in this community?

(Testimony of Nelson Baker Lansing.)

Mr. Landau: Objected to, if the Court pleases, until we get some basis for a conclusion. Let's get some remarks, if any, or statements, what statements were made. If a man is going to render a conclusion, let's find out what he bases his conclusion on. At least that is what I try to do.

The Court: He can state whether he has a basis for forming an opinion, and he can give his basis for it.

Mr. Landau: The last question was what his opinion was before getting the basis.

The Court: Well, I think it is six of one and half a dozen of the other whether you give your reasons before you give your opinion or give your opinion and then give your reasons. The witness may answer and give his reasons.

The Witness: I have kind of lost the question now. [90]

Q. (By Mr. Hoddick): The question, Mr. Lansing, was whether from these conversations which you have had with your friends at lunch at the Capitol Market and elsewhere there does exist in this community—it is your opinion that there exists in this community a prejudice against the defendant Winston Churchill Henry.

A. Well, I think it is about 50-50.

Q. You mean you think about 50 per cent of the people are prejudiced and 50 per cent aren't?

A. That word "prejudiced" kind of gets me. About 50 per cent believe he is guilty and 50 per cent believe he is not as guilty as they say he is.

(Testimony of Nelson Baker Lansing.)

The Court: As guilty?

The Witness: As guilty.

Q. (By Mr. Hoddick): Now, what statements can you recall, or what conversations in particular, which lead you to that conclusion?

A. No, I couldn't state. I don't remember the conversations enough.

Q. Have these people with whom you have spoken indicated that they feel that Henry—the 50 per cent who you say do not think he is guilty—

A. As guilty as they say he is.

Q. Now, do those people—have they indicated that, by stating that, they think he should be given a fair trial? [91]

Mr. Landau: I object to it, if the Court pleases. It is not only leading and suggestive, but it is not within the realm of this particular question, the question that has been put to this witness. The witness has testified. I think it is improper for Counsel to try to put words in the witness' mouth.

The Court: As I understand the witness, the people with whom he has conversed on the subject all believe the defendant Henry to be guilty, but some don't believe him as guilty as others believe him. Isn't that what you are telling me?

The Witness: Yes, and in most of the cases they think he should be sent out of the country, be glad to get rid of him.

Q. (By Mr. Hoddick): Have any persons, Mr. Lansing, with whom you have spoken, indicated

(Testimony of Nelson Baker Lansing.)

that they did not feel that the defendant Henry deserved a trial?

A. Oh, they all believe that he deserves a trial.

Q. And from your conversation with them are you disposed to think that they have prejudged Mr. Henry's guilt? A. Not necessarily.

Mr. Landau: I object. I think the witness has already answered that, if the Court please, quite decisively to questions by Counsel and by the Court.

Mr. Hoddick: I think the witness should have an [92] opportunity to elaborate properly on those answers so that he can convey to the Court and myself and Mr. Landau what he meant by it.

The Court: All right, if you can clear it up; I will allow the answer to stand.

Mr. Hoddick: I don't have any further questions.

#### Cross-Examination

By Mr. Landau:

Q. You have heard the expression, "Let's give him a fair trial and hang him," Mr. Lansing?

A. No, I haven't.

Q. Never have? A. No.

Mr. Landau: That is all.

The Court: Excused.

(Witness excused.)

Mr. Hoddick: Mr. Murphy, please.

## BYRON KENT MURPHY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Hoddick:

Q. Mr. Murphy, will you give your full name, please. A. Byron Kent Murphy.

Q. Where do you live? [93]

A. 4005 Round Top Drive.

Q. And what is your occupation?

A. Real estate broker.

Q. How long have you been in the Territory of Hawaii? A. March, 1940.

Q. Have you discussed the case of Winston Churchill Henry, or any of the cases in which he has been involved, with your friends or other people? A. I have discussed it, yes.

Q. With many people or just a few?

A. Few, comparatively. The ones I come in contact with, very few.

Q. Would you care to approximate as to how many, ten, fifteen?

A. For over what period of time do you want me to indicate?

Q. Ever since you first discussed Winston Churchill Henry with anybody, from the start.

A. I would say I might have been in a conversation concerning Winston Churchill Henry, say 20 times since I first heard there was such a person.

(Testimony of Byron Kent Murphy)

Q. And do you remember any specific conversations that you can give the details of to the Court and to myself and Mr. Landau?

A. None that I could give any detail to, no. [94]

Q. Your references are general rather than specific? A. Yes.

Q. And from those conversations that you have had—were those conversations generated by articles which the people with whom you conversed and yourself had read in the newspapers?

A. Yes, oh, yes.

Q. For the most part?

A. Practically in every case, because otherwise there would be no way of knowing about it. The paper initiated the discussion, the news articles, that is.

Q. And from those conversations did you gather that the people with whom you discussed Henry felt that he did not deserve a trial?

Mr. Landau: Objected to. That isn't the question, if the Court pleases. The question is whether or not there is prejudice.

The Court: That is right.

Q. (By Mr. Hoddick): And those people with whom you discussed Henry, was it your opinion that they were prejudiced against Henry?

A. I will say generally no.

Q. Where have you had these conversations, at lunch, and so on?

A. Oh, and so on, yes, various times and various places. [95]

(Testimony of Byron Kent Murphy)

Q. Did the people with whom you discussed Henry seem to feel that this newspaper publicity which he had received was the normal thing which happens when a man becomes enmeshed with the law at frequent occasions?

Mr. Landau: I object to it as leading and suggestive, if the Court please, and I think——

The Court: Sustained.

Mr. Landau: I think——

The Court: Sustained.

Mr. Landau: I want to add another objection.

The Court: One is enough.

Mr. Landau: On another matter. I would like to be heard.

The Court: All right.

Mr. Landau: This witness has given an opinion. I had objected previously to the witness giving an opinion unless he gave facts, and the Court said it didn't matter whether he gave his opinion and facts later. Now the man has given an opinion, let's get the facts before we go over to something else.

The Court: Are you making a suggestion to me or to Mr. Hoddick?

Mr. Landau: I am making a suggestion to Court and Counsel.

Mr. Hoddick: He has given the facts to the best of [96] his recollection. These constitute things over a period of time, a period of exposure. He cannot be expected to remember specific details.

Mr. Landau: May I inform Counsel for the Gov-

(Testimony of Byron Kent Murphy)

ernment that I did not have a witness express an opinion until he had given facts on which he could base an opinion.

The Court: Opinions unsupported by facts are of no value.

Mr. Landau: I didn't get you.

The Court: Opinions unsupported by facts are of little value; facts or reason.

Mr. Hoddick: I have no further questions.

#### Cross-Examination

By Mr. Landau:

Q. You say, Mr. Murphy, that there is generally no prejudice. You will also admit that there was some prejudice, was there not, Mr. Murphy?

A. I think there is prejudice in any issue there is, because it is Winston Churchill Henry or anything else, there is always prejudice in the community about something.

Q. At least, this was a subject of many conversations with you?

A. I estimated twenty over a period of, say, six or seven months, yes. I wouldn't call that many.

Q. Mr. Murphy, how did you happen to come on the [97] witness stand?

A. I was having luncheon at Woody's Luncheon across the street. Mr. Hoddick approached me and asked me if I had seen any articles in the newspapers regarding—

(Testimony of Byron Kent Murphy)

Q. Without going into what he told you, he questioned you and then put you on the stand; is that correct? He asked you some questions at Woody's and asked you to appear as a witness?

A. I would like to explain it in full or it doesn't give a fair answer.

The Court: Go ahead.

The Witness: He asked me if I had seen any articles in the newspaper regarding Winston Churchill Henry, and I said I had. He said, "If in the event you were selected to sit on a jury, would you be influenced by the articles you read in the newspaper in an effort to either convict or release this man of those charges?"

I said that I would not be influenced by anything that I had read but only by what would be presented to the Court and the jury.

Q. (By Mr. Landau): And as a result of your conversation he asked you to appear as a witness?

A. Then, not until I had made that statement, then he said—asked me to appear as a witness.

Mr. Landau: I don't believe that the statement which [98] the witness gave is of any evidential value on this matter, but in order to avoid any possibility of doubt, the testimony which he has given is on the same line as Counsel tried to bring out through a previous witness, which was not admitted; the witness answered a question at length, not in direct answer to my questions, and for the purposes of the evidence in this case I ask that that be stricken.

(Testimony of Byron Kent Murphy)

The Court: You asked him how he happened to be here and he told you.

Mr. Landau: Yes.

The Court: That answer relates to how he happens to be here.

Mr. Landau: Only to that.

The Court: That is right.

Mr. Landau: That is all.

The Court: Any further questions?

Mr. Hoddick: No further questions.

The Court: Excused.

(Witness excused.)

Mr. Hoddick: That is all, your Honor.

The Court: Rebuttal?

Mr. Landau: May I put Mr. Berman on, if the Court pleases, the witness I have been waiting for?

### EDWARD BERMAN

called as a witness on behalf of the Plaintiff, being first [99] duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Edward Berman.

Q. And what is your profession?

A. Attorney-at-law.

Q. Mr. Berman, you are here at my request as a witness in this case? A. That's right.

(Testimony of Edward Berman)

Q. I discussed this matter with you a little before 2 o'clock this afternoon?

A. That is true.

Q. And asked you, after talking to you, to appear as a witness in this case?

A. That's right.

Q. Now, Mr. Berman, have you, either in your professional capacity or as an average citizen of the Territory, had discussions, or have you heard comments or statements made, about the defendant Henry with reference to these cases in this court?

A. I have.

Q. Will you tell the Court to the best of your recollection what some of those conversations, comments, or statements were? [100]

A. Well, it so happens that I belong to what we informally call a breakfast club. We have our breakfast at the Young Hotel practically every day of the week. On at least two occasions when this publicity about this case got into the newspapers, I heard some very definite comments about the individual Winston Churchill Henry.

Q. Will you tell us what those comments were, Mr. Berman?

A. Well, on one of these occasions there had been some publicity in the newspaper that morning about the Henry case or cases, and one of the individuals specifically at the breakfast table—I don't know how the conversation began, but I believe he had referred to the newspaper article—made some

(Testimony of Edward Berman)

comments which—of course, there were no ladies present—but they were to the effect that this “son-of-a-bitch” ought to be gotten out of town; and they were referring to the type of offense in particular, or specifically; and we ought to run the “S.O.B.” out of town. And the comments around the table by the other people just reiterated the statement that was made at the breakfast table.

Q. Were there any other comments along those lines?

A. There was another occasion where there were other people, and I think it was two or three days later, where this thing had seemed to be in the papers every day during that period or was being discussed when the conversation was along that line by another individual. [101]

Q. Along the same line? A. Same line.

Q. Were there any conversations, statements, or remarks made or passed in your presence not at this particular breakfast club?

A. I have heard comments on the street by individuals, but not as defamatory as the ones made at the Young Hotel.

Q. What was the purport of those statements and remarks you heard on the street?

A. There was a reference in one case to the offense in particular, that that kind of stuff shouldn't be allowed here, and “we don't want people like that in Hawaii,” words to that effect, but not as strongly phrased as the comments I heard at the Young.

(Testimony of Edward Berman)

Q. Do you know what we mean by "Texas justice,"? Mr. Berman.

A. Texas justice?

Q. Yes, that is the expression "Let's give him a fair trial and hang the guy."

A. I have heard the expression. I have heard that.

Q. Were any of these remarks along that category or order?

A. I would say that the remarks at the Young Hotel by the people present would fit into that category.

Q. As a result of these conversations and remarks that [102] have been made do you believe that you would be in a position to give—venture an opinion as to whether or not prejudice does or does not exist in this community against this defendant? Answer that "yes" or "no." Do you feel you can render an opinion?

A. If the sentiment I heard at the Young Hotel is the general sentiment in this community, and I have picked it up on a few occasions I have mentioned here, I would say he wouldn't get one. I say if that is the general sentiment. I haven't discussed this with more than nine people if I could put it down in actual numbers. Altogether I would say there were nine, five people on one occasion, four on another, and individuals on the street, maybe an occasional individual, which I couldn't tell one way or other. If that is the general opinion here—if I

(Testimony of Edward Berman)

can answer it that way, your Honor—I would say “no.”

Q. At least from the conversations you had at least in that circle, that group?

A. That particular group, I would say “no.”

Q. He couldn’t get a fair trial?

A. Not with that group, not the way they acted that morning. I don’t know how they are acting today, but the sentiments expressed that morning were, in my estimation, very prejudicial to this person.

Mr. Landau: That is all. [103]

#### Cross-Examination

By Mr. Hoddick:

Q. Mr. Berman, about when was the last time you had such a conversation?

A. I would say approximately two weeks ago.

Q. All of the people with whom you discussed Mr. Henry, or who discussed Mr. Henry with you, expressed themselves in a prejudicial manner?

A. I wouldn’t say the nine people that were at these two occasions at the breakfast club, but I would say on one occasion either two or three of them and on another occasion at least three of them, and others remained silent, as I did, on the subject.

Q. Did anybody speak affirmatively?

A. In what sense?

(Testimony of Edward Berman)

Q. In a non-prejudicial manner.

A. Nobody spoke in any way except those who expressed themselves in a prejudicial manner.

Q. Have you heard anything said in the community that was non-prejudicial?

A. I have never heard a good word about this fellow.

Mr. Hoddick: No further questions.

The Court: Mr. Berman, do you know what the charges against this defendant are in this court?

The Witness: Well, from the comment that day I [104] gather that it dealt with narcotics.

The Court: Do you know whether or not the people whom you referred to as expressing opinions that you have reiterated knew what the defendant was charged with in this court?

The Witness: No, your Honor. I would say they were reputable businessmen in this community. I could mention their names here, if the Court wishes to hear some of the people present on that occasion.

The Court: I don't. I am simply asking whether or not you knew whether they knew what case they were talking about.

The Witness: Oh, yes, they referred to it.

The Court: What?

The Witness: To the narcotics, Federal offense. A whole gamut of crimes were mentioned at the breakfast table.

The Court: You have also indicated that if the sentiment of the community generally is like the

(Testimony of Edward Berman)

beliefs and opinions entertained by these nine people, you would say there would exist general prejudice in this community against the defendant?

The Witness: I would say "yes."

The Court: If it exists, but I take it you don't know whether it does or not? [105]

The Witness: Well, that is a very difficult question to answer.

The Court: That is the question we are interested in.

The Witness: These contacts, these statements, were not solicited by me. They came about casually as a result of meetings with people for breakfast. Nobody came there to discuss Winston Churchill Henry. They just came up casually as part of the usual discussions one has at breakfast about current affairs, so they automatically arose at these meetings, and that was the sentiment that I got, that I gathered, that—

The Court: But again on the basis of that you say if that represents the thinking and feeling of the community, you would conclude that prejudice, to a general extent, against this defendant exists?

The Witness: Yes.

The Court: I again ask you if you know whether that "if" is a fact or not?

The Witness: My contacts, or my experience, with this particular situation, your Honor, are limited to these particular occasions, and I can only express a statement as to those occasions.

(Testimony of Edward Berman)

The Court: So all you can talk about are nine people? [106]

The Witness: On three different occasions, yes.

The Court: All right.

#### Redirect Examination

By Mr. Landau:

Q. Mr. Berman, these people that you have discussed, are they in any one particular walk of life, or many walks of life?

A. Many walks of life.

Q. And they all associate, as far as you know, with the same people, or many, many people?

A. I would say they associate with many, many people. They are businessmen, small businessmen.

Q. Did any of them express, during the conversation, any statements made by other people in their presence, or anything of that nature?

Mr. Hoddick: May it please the Court, I have been objecting all through the course of this proceeding to the witnesses' testifying as to what people told them. I think we are compounding our hearsay to a point which should not be permitted.

The Court: What is the question?

Mr. Landau: The question is whether any of the people he had spoken to made any remarks indicating whether other people had spoken to them. I will withdraw the question.

The Court: That is compound hearsay. [107]

Mr. Landau: That is all. Thank you, Mr. Berman.

(Witness excused.)

Mr. Landau: That is all, if the Court pleases.

The Court: What have you proven?

Mr. Landau: I beg your pardon.

The Court: What have you proven?

Mr. Landau: I have proven prejudice, if the Court pleases, in this community. I have proven it through many, many instances. I have not been able to take the community and divide it in a certain number of segments and say in each of these segments there is prejudice. I think I have gone into the matter thoroughly and sufficiently, if the Court pleases, to give the Court a sufficient understanding of the fact that there is prejudice. True, we haven't been able to get everybody in, but we have enough people here to give you an undercurrent and tenor of the people in this community.

Here is Mr. Berman with one little group, and that group, makes remarks; Miss Noonan in her various work has come across people who have indicated that in their opinion this man shouldn't even be given a trial, irrespective of what the law says, that he is entitled to a trial; Mr. Lampley, who testified yesterday about the time he was in Hilo and the times he was here in Honolulu about remarks that have been passed, statements that have been passed; Mr. McGraw, who has testified of a wide acquaintanceship and many, many conversations with different people. I think that we have a pretty clear cross-section of the community, if the Court pleases, in the testimony of these witnesses, and the Court certainly won't, and doesn't, expect

me to bring in 100 per cent segmentation, but I imagine that the effect of the testimony which I have produced is along the line of a Gallup poll. We have a few people in various portions of the community and from that we can render an opinion as to what the rest of the people are thinking about. It is true they were a little mistaken in the last National election, but they have proven pretty accurate, and they go on a certain percentage. They don't take 60 per cent of 140,000,000 people. They may only touch upon one or two thousand people in the entire National poll and arrive at their figures that way. It is all we can and are expected to do in this case, if the Court pleases.

I believe even Mr. Lansing, Government's own witness, who was brought in to testify that there was no prejudice—and what did he say? He said this prejudice is about 50-50. When the Court asked him what he meant by that, he said 50 per cent of the people say he is guilty and the other 50 per cent say he is not quite as guilty as they say he is. In other words, they are all of the impression that this guy is guilty. Pau! Some of them aren't as firm about it as others, but that is their belief. That is, 100 per cent, in his estimation, of the people. And he was asked also: What [109] have some of the remarks been? And he carried out the general tenor of all the witnesses for this defendant, if the Court pleases, when he said that in most cases they believe he should be sent out of the country and we get rid of him. I don't know whether your Honor noticed

he was a little "hot" then. He was pretty vehement about that. And that is his feeling, that this man ought to be gotten out of the country: We ought to get rid of him. That is the opinion of the people in this community, if the Court pleases, and that is why I feel we cannot draw an impartial jury. I don't believe we can give this man a fair and impartial trial, which I know the Court wants him to have.

I haven't discussed the question of the newspaper articles yet.

The Court: I thought you were through.

Mr. Landau: But your Honor asked me one question about that one phase. If your Honor wants me to go into the question of the articles I certainly will.

The Court: Yes.

Mr. Landau: I want to try to get these in order of dates, if the Court pleases, although I guess it isn't too important. Apparently the first one that I have right here is the editorial of August 10, which is Defendant's Exhibit 6, entitled "Ubiquitous Mr. Henry."

Frankly, I don't know what that means, but I know it is [110] not intended to be complimentary.

#### "Ubiquitous Mr. Henry

"Mr. Winston Churchill Henry has been entirely too much in Honolulu's police news during the past two years. He has been arrested on eight occasions, charged with seventeen violations of the law."

Now here they say he has been arrested. If the Court pleases, I am talking now about cases in the Territorial courts where all kinds of convictions, even for minor misdemeanors, would be able to have been introduced to impeach a man's credibility. They say:

“He has been arrested on eight occasions, charged with seventeen violations of the law. Each time he has quickly been released on bond, many times being re-arrested under conditions that seemed like a resumption of the offenses charged before previous accusations against him have been disposed of by the courts.

“He has paid one fine of \$10.00. . . .”

They didn't say, if the Court pleases, that that fine for \$10 was for spitting on the sidewalk.

“He has paid one fine of \$10.00, delayed another of \$200.00 by a notice of appeal. He has been sentenced to two terms of sixty days in jail, with subsequent suspended sentences of thirteen months, and regained his liberty on bond by notice of appeal. [111]

“His first arrest here—”

They are arrests and not convictions.

“His first arrest here—his record shows seventeen prior arrests on the mainland—was two years ago, August 25, 1947, on a charge of ‘soliciting.’ Five months later the case against him was dropped by a ‘nolle prosequi,’ unwill-

ingness to prosecute. Police records indicate evidence that marked money given to him was found shortly thereafter in a woman's possession.

"Since then he was found guilty of assaulting policemen,—"

And this at the time, if the Court pleases, when that conviction was on appeal.

"——was the central figure in five raids on barricaded premises at Waikiki and on a woman's abode on Hausten Street. Narcotics, gambling devices, illicit firearms, women were found by the raiders. Each time Henry was freed on bond. He is at liberty now after arrest early Sunday morning.

"This man stands convicted of assaulting policemen."

And that isn't the truth because the case was on appeal at the time.

"He is found repeatedly in situations that require his arrest. Yet he manages to stay in circulation. To the layman it appears that his innocence or guilt should be established within the shortest possible time, and that in [112] the meantime some way might be found whereby the police can account for all his actions at all times.

"Whatever the technicalities of the law may be, Winston Churchill Henry has shown with-

out question that he contributes nothing to the social and moral welfare of Honolulu."

This, if the Court pleases, is editorial comment. It is an editorial comment not only on pending matters but on a matter which could have no other possible reason for its existence except to inflame and prejudice people. In some of these articles I will read as we go along there may be something that has a news-worthy purpose. Certainly an editorial of this nature has no news-worthy purpose. It is a sermon; it is whatever you want to call it. They are commenting, and commenting prejudicially, against this defendant. They are intimating that this man should not be permitted even to take an appeal on his convictions, because they say: "He has delayed another—" referring to a fine "—of \$200.00 by a notice of appeal."

They say that a "nolle prosequi" is an unwillingness to prosecute. We know "nolle prosequi" is not an unwillingness to prosecute, but refusal to prosecute for some reason. It might be, and probably always has been, failure to have enough evidence to convict. In other words, throughout these cases, with the exception of the fine of \$10, has been unfavorable [113] comment about his ability to go through the proper and orderly processes of court to get a fair trial, and they think that because he is doing that, he is a bad character and that he is "putting one over" on the public, because he is trying to get a fair trial and trying to go through

on appeal on various matters which he has a legal and moral right to do.

So I say, if the Court pleases, at least beginning on August 10, 1949, we have an attempt made by the Advertiser to prejudice the people against this defendant, and it has had this effect; there can be no question about it.

We also have another editorial comment in Exhibit No. 7 of the same newspaper, Wednesday, September 28, 1949. Again they have done the same thing. They say that this man was arrested eight times on charges of seventeen violations of the law. Now, I submit, if the Court pleases, that is again an editorial comment which is not supported, not only by the proper evidence, but we also have a situation where they are commenting upon a situation which prospective jurors have absolutely no right to know anything about, prior arrests. They are not supposed to know that, and if he is convicted of a proper charge in this court, if he had been convicted of a proper charge, it could be used to impeach his credibility, but that is the only way prior convictions against a defendant can come in. Not only do they list prior convictions, they also say he has been arrested. So when a jury comes in to try this [114] man, even though no evidence is ever introduced as to prior convictions, they have from the newspaper articles full knowledge and awareness that this defendant has been arrested on many occasions and may have been convicted of many offenses, as a matter of fact, some of which should not ever have been permitted before them.

Finally we try the case on October 5, 1949, if the Court pleases, and the judge down in the district court acquitted the defendant, and the Star Bulletin of October 6, 1949, says: "Winston Churchill Henry Again 'Beats Rap.'" Now that is language, if the Court pleases, to my knowledge of the movies, leads me to suspect is language of the underworld, "beats the rap." I don't think that your Honor or Counsel or I, when we win a case, say we "beat the rap"; we say "the defendant was acquitted." I don't know whether Mr. Richards, who wrote this article—as a matter of fact, he said he didn't write the headline; he wrote the article, but didn't write the headline. It was the city editor, I think, who wrote the headline. I don't know whether the city editor was trying to be facetious or what his purpose was, but "Winston Churchill Henry Again 'Beats Rap!'" What does that lead the average layman to believe? That this man, Henry, a vicious criminal of the underworld of Honolulu, has again pulled some shenanigans whereby he has been acquitted of one case.

Now, I don't know when the previous time was that he [115] "beat the rap," but the editor here saw fit to say he "again beats the rap."

Now, as a matter of fact, if these articles that were in the newspaper—and I will admit there were a lot of them, and I haven't brought one-third of them in because I have felt some of them are ordinary comments on pending cases; for instance, if a case takes five or six days to try, newspapers re-

port, and some of them have been very conservative. They have said that so many witnesses have testified today and the case will go on tomorrow, or the case has been continued. But I have picked out the few that I have been able to get, if the Court pleases, where I believe that they can have no effect except to inflame people against Mr. Henry.

This one of July 21, if the Court pleases, in the Bulletin, which is Defendant's Exhibit No. 3, "Little Harlem's Boss Arrested." Well, who gave him that appellation, if the Court pleases? The newspapers did. They say he is the boss of Little Harlem. There is no evidence of that except that this defendant is just one of a number of colored people who live on Smith Street, no evidence whatsoever that he is the boss, that he is the leader of the underworld, if the Court pleases. That certainly can have no effect except to prejudice people against him. As a matter of fact, it got so bad that even people wrote to the editor. Here is one by Peter P. Shaw, as a matter of fact, although it is not in evidence because I couldn't [116] find it; but I know there was at least one other written statement before this.

It says:

"Surely he must realize that he is wasting his time since one Winston Churchill Henry has been arrested several times this year. He has been in a barricaded place along with his guests or clients, liquor served from a well stocked bar has been found, evidences of gambling and not

only two little marijuana cigarettes have been found in Henry's house, but large quantities of drugs, some of them buried in the garden.

"This man Henry does not belong here but is from the Mainland and still at large.

"Once more I ask who and what is behind Henry?"

If the Court pleases, here is one man—perhaps if I were able to find Peter B. Shaw I would like to bring him in—Here is a man who writes to the editor, and certainly there is a good man to pick on the jury. Where does he get all this information if not from the items in the newspaper? Why is he so incensed, if the Court pleases, if not from articles that have been written in the newspapers about this man calling him the "Boss of Little Harlem," or, as in Defendant's Exhibit No. 2, "one of Honolulu's better known underworld characters." I don't even know whether we have an underworld in Honolulu, but the Star-Bulletin says he is a "better known underworld [117] character." There he is saying the guy is a criminal. As I understand it, the underworld is populated by criminals.

And there is the time when a case was nolle prossed against this defendant. Of course, it has created considerable publicity. Here the newspaper publishes a statement of the Chief of Police: "'I'm quite concerned because I don't feel the court was fair in not granting the continuance. The defendant has been granted several continuances.'" The only purpose of that, of course, and the only effect of

that, is that people reading this article immediately say, "Well, this guy Henry—" I have heard remarks of that nature. Of course I can't testify to them and I am not going to, but that is the result of things like that.

The other day, November 8, 1949, the defendant and some others pleaded nolo contendere to charges of being in a barricaded place and were fined \$25, which the Court, in its judgment, thought was a fair and reasonable fine and punishment under the circumstances. And what do we find? We have approximately an inch headline "Henry Gets Off Again For \$25." Is that a fair comment?

Then we have, of course, if the Court pleases, the article that was in Wednesday, September 21, in the Bulletin, which is Exhibit No. 1. That listed his so-called record, the record which, if the Court pleases, comes from the Police Department, and which, the Court may take judicial knowledge of the fact, [118] I as defense counsel for this defendant am not entitled to get hold of. So the only way I know of the police record is what I read in the newspaper. But the police give it willingly and voluntarily to the newspaper reporters, because they know that the newspaper reporters are going to write an article about this thing. And what do we have?

The Court: You didn't establish that in your evidence. You skimmed over that in questioning the witness as to where the newspaper man got the man's record.

Mr. Landau: I thought he said he got it from the police department. I may have been mistaken.

The Court: I think he said he went into the records division and got it.

Mr. Landau: That's right.

The Court: But as to what right he had didn't appear.

Mr. Landau: Well, I think your Honor can take judicial knowledge that the newspaper reporter is not going into the records division and get a man's record without the police department's consent.

The Court: I don't know.

Mr. Landau: Well, anyway, here is what they say about his record:

“August 25, 1947—Arrested for soliciting. He pleaded not guilty and was committed to circuit court [119] where the case was thrown out for lack of evidence.”

Well, now, in the first place, that is not a conviction. Had he been convicted of that offense that particular conviction might be able to be used to impeach his credibility. But here there was no conviction whatsoever, merely an arrest.

“January 3, 1948—Charged with profanity and given a 13 months' suspended sentence which he appealed. On the appeal he was fined \$10 in the first circuit court.

“May 3, 1948—Charged with loitering and committed to circuit court where he demanded a jury trial and pleaded not guilty. The case was thrown out in the first circuit court.

“July 17, 1948—Arrested for spitting on the sidewalk. He forfeited a \$10 bail.

“August 28, 1948—Charged with assault and battery on a police officer. He pleaded not guilty, demanded a jury trial and was committed to circuit court. He was found guilty and sentenced to 60 days in jail, suspended for 13 months and fined \$200.”

They don’t say that that case was appealed and is on its way up to the Supreme Court of the Territory.

“August 28, 1948—Charged with possessing unregistered firearm. Pleaded not guilty, demanded jury trial and committed to circuit court. The case was remanded to district court where it is still pending.

“On the same date he was charged with illegally acquiring [120] a firearm. That case, too, is still pending in district court.”

It is a case not even tried yet.

“July 16, 1949—Possession of a machine gun and violation of firearms regulations. Still pending in district court.

“July 21, 1949—Charged with being in a barricaded place and permitting gambling in his home. Still pending in district court.

“Record on Mainland.

“Following is Henry’s Mainland record—at least, what police and federal authorities know of it:

“August 1, 1934—Charged with petty theft in El Centro, Calif. He was sentenced to 50 days in jail.

"March 31, 1939—Charged with a traffic violation in El Centro and fined \$50.

"September 13, 1945—Charged with disorderly conduct in Juneau, Alaska, and fined \$100.

"Several other arrests for various offenses committed on the Mainland are on record here.

"Dispositions of these cases have not been received."

What have they done, if the Court pleases, in this article? They have given the general public, and certainly prospective jurors in this case, a list of cases which he was never tried on, some which are convictions which could not be [121] used in this court to impeach his credibility, some cases which at that time had not even been heard by the court; and then they go on to say: "Following is Henry's Mainland record—at least, what police and federal authorities know of it:" Inferring there is a whole lot more, but the police and federal officers don't know it.

And then: "Several other arrests for various offenses committed on the Mainland are on record here."

I submit I fail to see how the general public in this community could fail to be definitely influenced against this defendant as a result of these articles, and I submit, although it can't be specifically tied, that these articles were the cause for all the remarks that have been made. I think it is perfectly logical to assume that these articles in the newspapers were the ones that caused people to start

talking. And there is a wide sentiment in this community, if the Court pleases, which believes what the newspapers say and believes in the Texas form of justice.

Now, a peculiar situation arose, which the Court may have seen, in yesterday's newspaper with reference to the Lewis assault and battery case.

The Court: Reference to what?

Mr. Landau: The Lewis assault and battery. Mr. Lewis was charged in the Territorial courts—

The Court: Who is he? [122]

Mr. Landau: He is supposed to have beaten up this woman over this week-end.

The Court: Oh.

Mr. Landau: And a reporter apparently asked Mr. Hite whether he was going to prosecute him, and Mr. Hite, as quoted in the paper, said—

Mr. Hoddick: Excuse me, Mr. Landau, I don't see how that has any relevancy.

Mr. Landau: It is just a story to indicate how people believe what is stated in the newspapers. If I may be permitted—

The Court: Go ahead.

Mr. Landau: He said something along this line: What I read in the newspaper and what the police have, there is enough evidence to convict.

I cite that, if the Court please, to show that even the prosecutor reads and believes what the newspapers publish about cases; so that if a prosecutor believes that, certainly the general public would be equally subject to newspaper reports. As Mr. Mc-

Grav said on the stand, Will Rogers once said all he knows is what he reads in the newspaper, and I think that is pretty true of what everybody in the community feels. The newspaper articles are thoroughly perused by everybody from page to page. They are subject to comment, as they were in this case, and they are unfavorable; they are [123] intended to be unfavorable. Whether that was the purpose, I don't know, but they certainly resulted in arousing considerable prejudice against this defendant, and when I stand before your Honor and say that in my opinion, from the evidence that has gone in, this man should be given the opportunity of being tried by a jury which will have absolutely no prejudices whatsoever, I know that your Honor is not going to be influenced by my statements, but I do want your Honor to be influenced at least by my sincerity.

Mr. Hoddick: May it please the Court, the thing that astounds me about this entire proceeding is the basic attack which Mr. Landau makes on our jury system. He knows and you know and I know that no jury is ever selected from a vacuum. We can't go out to the Himalaya Mountains and find twelve people who have never heard of a defendant who has received considerable publicity and who therefore have no previous information as to the cases which are prepared against him. However, when a juror is sworn into the box as a juror and he takes the oath that he will obey the instructions of the Court, we are provided safeguards. The Court in-

structs the jury that they will only find their verdict on the evidence which is adduced in the court room, and on their oaths they have said that that is what the basis for their verdict will be. If all the cases that have been publicized in the newspapers had to be removed to another venue, we would have the [124] witnesses traveling from one district to another district all over the country. You would hardly be able to try a case out here in Hawaii; you would have to take them all back to the Mainland. Certainly it is anticipated that the community as a whole will receive some advance information about a case or about a particular defendant, and the newspaper articles may be favorable or they may be unfavorable, but the basic presumption of our system is that if those men, on their oath, go into the jury box stating that they will act fairly and impartially, that is what is going to happen. If you are just going to discard that presumption, you might as well discard the whole jury system. Maybe we should arrange for an importation of people from Asia or Africa to try each case.

He says that these articles can have no effect except to inflame the people. The articles which he has introduced in evidence certainly are not favorable to Mr. Henry, at least most of them are not; but if they don't state facts, Mr. Henry has recourse. If they do state facts, they are something any newspaper is privileged to publish.

And then we again have to find out whether the jurors, as they are selected, will be able to act fairly

and impartially; and in that regard, I think this motion, this hearing, and all the evidence introduced are entirely speculative. I don't think your Honor knows now, any better than he did before the proceedings started, as to whether from the panel which has [125] been drawn a jury of twelve men tried and true could try Mr. Henry fairly and impartially.

We have been given an indirect insight into small segments of the community. There is no showing that it is representative of the whole. There is no showing that it is representative of what the state of mind concerning Henry is in the community to-day, and there is certainly no showing that it is representative of what the state of mind in the community will be at the date when the jury is called.

I think that the disposition which they made of the Eisler case of a similar motion is most proper.

"The effect of such published articles or the Executive Order referred to in the motion upon anyone called to serve as a juror in this case is only speculative and cannot be dealt with until an examination of those called for service as jurors reveals whether or not a jury can be secured, no member of which is or is likely to be influenced thereby. For these reasons, the motion for transfer upon the first ground is denied without prejudice to a renewal of the motion on this ground at the trial, if and when it appears that a fair and impartial jury cannot be secured."

In *Corpus Juris*, Vol. 22, page 313: "The exami-

nation of jurors on their voir dire has been said to be the best test as to whether local prejudice exists."

This hearing has been restricted to the introduction of evidence which will tend to show generally whether there is prejudice in the community or is not prejudice in the community against Henry, but the whole theory of law that underlies such a showing as a basis for the transfer of the case is that if there is such a showing of such widespread prejudice, it will not be possible to select a fair and impartial jury.

Now, some of the defendant's witnesses, at least Miss Noonan, indicated that all the persons with whom she discussed this matter were not inflamed against the defendant, that they did not all think he should be sent out of the country without a trial. In fact, there seemed to be some dispute amongst those who discussed Henry as to whether that should be done or whether he should be given a fair trial. I suspect the conversations probably resulted when the furor occurred in the paper following the refusal of the judge to grant a continuance.

The Court: How about your witness Mr. Lansing. He said 50 per cent believe him guilty and 50 per cent believe him not as guilty—

Mr. Hoddick: However, he went on to say, I believe, that it was his opinion that the 50 per cent who believed him not as guilty were not people who had, I believe, pre-judged his guilt, or something on that order.

I don't think there is any question that there are people [127] in this community who are prejudiced;

I will admit it, but I don't think that that prejudice is so widespread, nor has it been shown that it is a prejudice which would prevent the defendant from being able to draw a jury who could try him fairly and impartially; and I don't think that has been shown to the Court.

The cases have repeatedly held that newspaper articles prejudicial newspaper articles, are insufficient as a basis for granting a motion for a change of venue; and on that score you have Shockley vs. U. S., 166 Fed. (2d.) 704; Allen vs. U. S., 4 Fed. (2d) 699; cert. denied by the U. S. Supreme Court.

In the Lias case, 51 Fed. (2d) 215, Fourth Circuit, 1931, cert. denied by the Supreme Court 284 U. S. 604, they found that the refusal to grant a motion for a change of venue did not constitute error. They repeated the old rule of law that this is entirely a matter which rests within the discretion of the trial court, trial judge, and in that case they delayed a finding until the jurors were examined on their voir dire.

I think in every community there is bound to be certain ideas as to the guilt or innocence of a particular defendant whenever that defendant has received widespread newspaper publicity. That is just a fact, something you can almost take judicial notice of. The essential question is whether from that community, and despite those articles, you are going to [128] be able to find a jury who can give that man a fair trial.

I submit that the motion for a change of venue

in each of these two cases should not be granted. Aside from the fact that it is my opinion, for what it is worth, and even from listening to the testimony adduced here, that a fair and impartial jury can be drawn, the Court should consider in exercising its discretion, your Honor, whether the showing is so clear that the Government should be put to the expense which would necessarily result if these cases were to be transferred. Under the statutes jurisdiction is vested in the district court located in the district where the offense took place. It is the primary responsibility of this Court to hear this case, unless you are convinced by what you consider a perfectly clear showing that it would be impossible to obtain a fair trial here, and I do not feel that any such showing has been made.

Mr. Landau: If the Court pleases, we admit, and have never stated otherwise, it is a discretion of the Court; it is not a matter of right. We also must admit, and we have never contended otherwise, that the community is not 100 per cent inflamed against Henry. We know there are some right thinking citizens in the community who will not pass judgment upon him until after the trial; but our difficulty is going to be in finding them, if the Court pleases.

It is a rather peculiar position for me to be in, living [129] in this community and liking to live in this community, and trying to announce to the Court that there isn't a right-thinking man in here except me. If the Court pleases, I defy Counsel, or any-

body in this community, to give me one example of any one individual, with the possible exception of the Massie case, that has excited so much editorial comment about one individual charged with an offense. Certainly in the years that I have been here, about the same length of time as your Honor, I don't remember one single instance of so much of this type of stuff appearing in any one case; and I say that, if the Court pleases, knowing full well that prior to my service I was employed, engaged, and associated with one Mr. Patterson, who has had a large number of criminal cases, some of them of considerable widespread importance; and not one of them has received the comment that this one has.

Now, if we were to believe Counsel as to the innocuous effect of any of these newspaper articles, I wonder how he can explain away the fact that when a jury has a case, or while they are listening to a case, they are instructed, not asked, instructed not to read newspaper articles concerning the case, and that when they are deliberating on the case, they are told directly that they must not read anything about the pending case. Why? Because the judge is a mean old "son-of-a-gun," or because he does not want them to read anything that might influence them in their judgment? So we have more than a little [130] precedent for the fact that the judges and the courts are aware that newspapers can and do influence people, and if that were not the case, would there ever be a situation where editors were found guilty of contempt of court for publishing

articles and commenting upon certain cases before they had been disposed of? Now, if the Court pleases, as a matter of law I think it is a question for the prosecutor in his capacity as prosecutor to ascertain whether or not some of these articles are not, in fact, in contempt of your Honor's court because they are commenting and because they are permitting things to get to prospective jurors which should not be permitted.

The Court: Have you read the most recent decisions of the United States Supreme Court on the subject of contempt?

Mr. Landau: Actually, I have not, your Honor. I am just suggesting that as a possibility, not arguing the particular point.

The Court: The old-fashioned law that you and I have in mind, I doubt seriously, in the light of those decisions, whether it still pertains. There seems to be greater emphasis today to restrict the courts and enlarge the scope of free public press.

Mr. Landau: That is limited, if the Court pleases, to newspaper articles, but not editorial comment.

The Court: I am not prepared to decide. [131]

Mr. Landau: That would be my suggestion in answer. I am not prepared either.

The Court: But just generally speaking, the Supreme Court has whittled down the powers of the court. However, I have recently had an editor of a newspaper, or we have, up to see us on the basis of certain photographs; but that is neither here nor there.

Mr. Landau: Now, Counsel in his discussion said there is no showing what the temper of the people is today or what it will be at the time of the trial. I suppose what he intends that we have to prove is that not only have they been prejudiced yesterday, but that they are prejudiced today and will continue to be prejudiced tomorrow. Now we know very well human emotions just don't turn off and on like water in a faucet. They are prejudiced and their prejudice remains, and I think it is a good presumption that once an existence of a fact is shown, it is presumed it will continue to exist.

The Court: Shouldn't we also consider in this the fundamental, underlying fairness of the American public and the fact that they dislike to see a person taken unfair advantage of?

Mr. Landau: That is fine for the other person, but not when it comes to them. I mean, the American public has that feeling; they don't like to see the underdog kicked; but it applies to the other fellow and not to me. That is the [132] general idea. I am just as aware of that as your Honor.

The Court: I think you are wrong.

Mr. Landau: That may be the general feeling, that is true. I like to think, at any rate, that we as American citizens want to see everybody get a fair "break," but if that were the situation, if the Court pleases, then you would never have a question about changing of venue because of prejudice. I mean, the people who drew up our rules of criminal procedure would have said, "We don't have to

worry about change of venue for prejudice because it doesn't exist." It does exist in spite of what we like to think about it, if the Court pleases. We certainly know that the term Southern or Texas justice is not something that has no basis in fact. We do know that we have had vigilantes where people were executed without being given a trial. We do know that the saying, "Let's give him a fair trial and hang him right away," has some existence in fact. It isn't just a figment of the imagination. So we do know people become inflamed and prejudiced, if the Court pleases, that it overcomes their basic love for fair play; and Mr. Lansing was an example, if the Court pleases. I was amazed at his answer and amazed at the vehemence with which he made that statement. And that is true, I think, of too many people in our community at the moment. I am afraid as long as Winston Churchill Henry is going to have to be tried by a jury in this community, with [133] the feeling that has been expressed by these witnesses, that it is going to be difficult to ascertain what the true situation is going to be in the jury's mind.

We don't have to show, if the Court pleases, that we cannot get twelve or even twenty-four or even thirty-six men in this community who would not give him a fair trial. I don't think that is the test. I think the test is: Is there sufficient prejudice so that he might not get a fair trial? Anything is possible, sure. It is very possible that he might get twelve men that will sit on the jury and give him a

fair trial, but it is not the question of whether it is impossible to get a fair trial. The likelihood of his getting a fair trial is such that to require him to go to trial in this matter would in effect result in his being convicted by the jury without the first witness going on the stand. And I submit, if the Court pleases, that if we had people who had the courage of their convictions who, if they had a prejudice, would take the stand on questioning on voir dire and say, "Yes, I am prejudiced," that would be one thing. But we know we don't have too many people with the courage of their convictions, as indicated by Mr. McGraw when he said he was amazed at the small number of white people who were willing to come up and have their names involved in this case. And that has been the situation all the way through. People are unwilling to be connected in any way, no matter how remote, [134] with Winston Churchill Henry for fear that the publicity which they will get will not do them any good, but will, in effect, harm them in their business or in their social activities.

If we have that, if the Court pleases, if we have that feeling in the community, I submit that is evidence of itself of the prejudice of people in the community and indicates quite clearly that these people who admit prejudice and refuse to testify because they don't want to get their names involved have done the defendant more service than they have anticipated, because it clearly indicates that these people, who are not criminals in and of them-

selves, are afraid and fear that the rest of the community will look down on them because they may have had the courage of their convictions to come up and tell your Honor what they believe as to whether or not this man could or could not get a fair trial.

I submit, if the Court pleases, in view of all the circumstances, and since it is discretionary, your Honor has got to say to himself, "In my conscience and in my heart, if I were to be tried in this community, if I were sitting in the other fellow's shoes and I were being tried under the spirit and temper and prejudice of the people, of which there can be no question there is prejudice, would I feel that I was getting a fair trial if I went to trial under those circumstances?" And if your Honor can say to himself under those circumstances that you would get a fair trial, then I [135] say to your Honor, "You deny this motion." But if, on the other hand, there is any doubt in your mind that such a fair trial could be obtained, then I believe that your Honor should grant this motion.

The Court: Well, I have heard the evidence and the arguments. I would say the argument was a lot better on both sides than the evidence on either side. On the basis of the Eisler case I am going to deny the motion without prejudice to the right to renew the same.

Mr. Landau: I take an exception to your Honor's ruling.

The Court: All right. Now where does this leave the matter? Ready for setting?

Mr. Hoddick: I think it will have to be set down for trial, your Honor.

The Court: All right. December 5.

Mr. Landau: I sincerely believe, if the Court pleases, that there should be a considerable length of time elapse between this hearing and the date set for trial, for the reason that I think that the public's attention and focus should be away from this case for a little while so that things can smooth down and quiet down and thus get into a situation, if the Court pleases, where we have more likelihood of getting a fairer jury. I earnestly request that of the Court.

The Court: You mean you aren't going to examine [136] the jurors on voir dire?

Mr. Landau: Oh, yes, I am going to examine them on voir dire, but I know human beings and I think, if the Court pleases, that in fairness to this defendant there should be a longer lapse of time before the trial of this case.

The Court: I can't see that. What is the calendar for December 5?

Mr. Landau: If the Court pleases, on that day I would like to inform the Court I have two cases set for another court, and on the 7th I start a jury case, which was set by his Honor Judge Parks today, and which, unfortunately, concerns the same defendant.

The Court: Well, you have two other attorneys with you, one of whom is temporarily ill.

Mr. Landau: Well, Mr. Fairbanks will not be

back at that time. I know definitely he won't be back on duty even on a partial basis until about the 15th of December. He was operated on Monday and he will be in the hospital for ten days and will be out of work for four to five weeks after that.

The Court: Well, today is November 9, or 10?

Mr. Hoddick: Tenth.

The Court: What is your thought?

Mr. Hoddick: Pardon me, your Honor?

The Court: What is your thought as to the date? [137]

Mr. Hoddick: Any time shortly before Christmas.

The Court: That is a bad time, shortly before Christmas.

Mr. Hoddick: Or shortly after New Years. I think the week of December 1 to December 7—in fact, from November 25 until December 7 I have cases scheduled for trial with this division and the other one.

The Court: How long is it going to take to try these cases? There are two separate cases.

Mr. Landau: There are two separate cases, if the Court pleases.

The Court: Which one comes on first?

Mr. Landau: I venture to state that each of these cases is going to be lengthy. I say this because of the fact that offshoots of these cases have been tried in another court and they have taken at least six sessions, each one of them, of approximately three hours each. We will have the problem of

picking juries. I can assure the Court it is going to be a long, long time on that matter.

The Court: December 5, nine o'clock.

Mr. Landau: Well, there are a lot of preliminary matters in this case which must be issued first.

The Court: Let's get them lined up and handle them.

Mr. Landau: I will try to get them to your Honor as quickly as possible. [138]

The Court: Motions?

Mr. Landau: Motions, yes, your Honor.

The Court: Well, I will tell you what I will do. Instead of December 5 I will make it January 3, with the understanding that between now and then you file any and all motions and move them on for disposition before January 3, because that is going to be the trial date, if a trial is required.

Mr. Landau: Yes, your Honor.

Mr. Hoddick: May it please the Court, we have, as you know, two cases.

The Court: The first one, January 3, related to what? The one that comes first by number.

The Clerk: That is the one that involves narcotics.

Mr. Hoddick: Henry is the sole defendant named in the indictment.

The Court: Is that clear?

Mr. Landau: Yes, your Honor.

The Court: In other words, after January 3 I am not going to hold up the proceedings any more for motions.

Mr. Landau: If I haven't filed them by then, I will not file them at all.

The Court: All right.

(Thereupon, at 4:50, the hearing in the above-entitled matter was adjourned.) [139]

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#### REPORTERS' CERTIFICATE

We, the Official Court Reporters of the U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of proceedings in Criminal No. 10,253, United States of America, Plaintiff, vs. Winston Churchill Henry, Defendant, held in the above-named court on November 1, 9, and 10, before the Hon. J. Frank McLaughlin, Judge, and a Jury.

/s/ ALBERT GRAIN,

/s/ LUCILLE HALLAM.

March 15, 1950.

[Endorsed]: Filed April 20, 1950 U.S.D.C.

[Endorsed]: Filed May 1, 1950 U.S.C.A. [140]

In the United States District Court for the  
Territory of Hawaii

Criminal No. 10,253

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant.

Before: Hon. J. Frank McLaughlin,  
Judge, and a Jury.

Appearances:

HOWARD K. HODDICK, ESQ.,  
Assistant U. S. Attorney,  
Appearing for Plaintiff;

NAT RICHARDSON, ESQ.,  
Assistant U. S. Attorney,  
Appearing for Plaintiff;

O. P. SOARES, ESQ.,  
Appearing for Defendant;

SAMUEL LANDAU, ESQ.,  
Appearing for Defendant;

WILLIAM Z. FAIRBANKS, ESQ.,  
Appearing for Defendant.

## PROCEEDINGS

(The Court convened at 10:10 a.m.)

(A jury was impanelled and sworn to try the case.)

The Court: Now, gentlemen, I am going to tell you for the first time and I will without doubt tell you several times throughout the course of this trial that you are not to discuss this case, or any phase of it, with anyone, including your wife or members of your family or with fellow jurors. You are not to discuss this case at all. The only time when you will be at liberty to do so is when the case is submitted to you for decision and you retire to your jury room and start deliberations. In the meantime I want you to refrain, as I have said, not only from discussing this case with anyone but also to refrain from reading whatever may be printed in various publications concerning the trial of this case. You won't miss anything. You will be here at the ringside and you will know everything that goes on, so there is no need of your feeling that you will miss anything by reading or omitting to read in the press whatever may be printed there.

And similarly I would suggest that you refrain from listening to whatever may be said concerning the trial of this case if it is said by anyone on the radio. In other words, you must keep throughout this trial the same frame of mind that you have now, as you started, and take every precau-

tion to assure that during the trial you are in no way prejudiced. And for that reason I am being abundantly cautious in having you refrain from reading the newspaper articles on this case. You can still read the sports page and the general headlines, of course, or listen to the radio commentators, and what not.

I meant to discuss with Counsel before I dismiss the other jurors whether or not they feel the need for alternate jurors.

Mr. Soares: From our standpoint I see no need for it.

Mr. Hoddick: I don't think so, your Honor.

The Court: You are all feeling well? All right. We will proceed with 12. Very well. Is there anything else that needs to be attended to at this time?

The Clerk: I don't think so.

Mr. Hoddick: After the Jury has been excused I would like to make a motion which I think can be disposed of in about five minutes, and we will be ready to proceed without delay in the morning.

The Court: All right. The Jury may at this time be excused and I will find out what it is you have to say. Until tomorrow morning at ten o'clock you are excused under the instructions.

(Jury excused at 3:20 p.m.) [2\*]

(Motion made by Mr. Hoddick to amend the first count of the indictment. Argument by Counsel. Mr. Hoddick withdraws motion.)

(The Court adjourned at 3:30 p.m.) [3]

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

January 5, 1950

(The Court convened at 10:10 a.m.)

The Clerk: Criminal No. 10,253, United States of America versus Winston Churchill Henry; case called for trial.

Mr. Hoddick: Ready for the Plaintiff, your Honor.

Mr. Landau: Ready for the Defendant. If the Court please, may we ask that the witnesses be put under the rule of exclusion, during the testimony and during the argument and opening statement?

Mr. Hoddick: May I ask for the customary exception as concerns Mr. Wells?

The Court: The rule itself includes the exception. Very well. Before we start upon the trial of this case, I will put all witnesses on both sides under the rule, which means that anyone who is to be a witness in this case is excluded from the court-room until called on the witness stand, with the exception to the limit of one for each side. Each side may have one person who may be a witness to remain with Counsel during the trial.

Mr. Landau: I object to that, if the Court please. This rule is invoked for a particular purpose. There is no reason for any exception. The Defendant has the right and he is a party to this case and should be here. But for the government to have any witnesses, no matter who they are, is [3-a] a highly improper view. We ask that the rule be invoked.

The Court: The rule, Mr. Landau, includes the exception. There will be no change in the ruling. It has been thus for years.

Mr. Landau: May we have an exception?

The Court: You may have an exception. Very well. The parties are ready to proceed. The Jury is present. The Defendant is present together with his attorneys. Gentlemen of the Jury, we are about to engage on a trial under an indictment which contains two counts, each of which the government undertakes to prove to your satisfaction beyond all reasonable doubt.

The Defendant engages upon this trial surrounded by a presumption of innocence, which is a presumption of real substance which abides with him throughout the trial until during your deliberations, if you are satisfied beyond a reasonable doubt, that the government has proven the charge in each particular, in the counts named in this indictment.

Count one of this indictment charges that on or about the 16th day of July, 1949—

“That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias ‘Frisco Shorty,’ did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of [4] opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was

not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code."

The second count of the indictment alleges—

"That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias 'Frisco Shorty,' the identical person named in Count I of this Indictment, being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, United States Code, did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes without having paid such tax in violation of Section 2593, Title 26, United States Code."

At this time the government may make its opening statement if it desires to so do.

Mr. Hoddick: May it please the Court, and gentlemen of the Jury, the Court has just read to you the indictment which was returned by the Grand Jury, and those are the facts which we shall endeavor to prove and which we believe we can prove to your satisfaction and beyond a reasonable doubt. [5]

During the trial of this case the government is not going to introduce any witnesses who will testify that they sold heroin or cocaine to the Defendant, nor will it introduce any witnesses who will testify that they transferred to the Defendant marihuana.

We intend to prove that at this lodging at 803 Hausten Street there were two houses, one in the front and one in the rear, the one in the rear being separated from the one in the front by a sort of dividing ditch over which there was a bridge; that the Defendant, Winston Churchill Henry, lived in that house in the rear; that found under a flag stone made of concrete, concrete paving stone, in the rear of that house and in the rear of 803 Hausten Street, which is surrounded by a fairly high tile wall, were found an Ovaltine box in which there were 915 capsules each of which contained heroin; that under the pillow on a sun couch in the patio in the rear of this house, in the rear of 803 Hausten Street, was found a bottle containing 250 grains of cocaine; that between the canvassed blinds and the screen, I think, in this same house where the Defendant lived, there was found a package, a brown paper bag containing 787 grains of bulk marihuana; that under the other canvass curtain or sort of drape awning that hung there was found a small box in which there were 29 marihuana cigarettes; and that in the house itself, under a cushion on the settee or under the [6] cushions there were found six marihuana cigarettes.

The Court will later instruct you that if we have convinced you—and I am certain that we shall—that the Defendant had these drugs in his possession, that they were under his dominion and under his control, that there arises from that presumption, from that possession a presumption that the De-

fendant unlawfully purchased those drugs, that is, the heroin and the cocaine, and that he unlawfully acquired the marihuana. Congress has enacted this statute providing fairly——

Mr. Soares: I don't like to interrupt Counsel, but this is not a statement of what Counsel expects to prove.

The Court: That is right.

Mr. Soares: He is attempting to tell the Jury what the law is, which is strictly the function of the Court.

Mr. Hoddick: We will prove to you that the Defendant had these drugs in his possession; that they did not bear the requisite tax-paying stamps. And then under the law it will be up to the Defendant to show, if we prove that to you beyond all reasonable doubt——

Mr. Landau: I object, I object to that. We are again arguing the question of the law, and it is not right for Counsel in his opening address to state that we have any burden of going forward, of proving anything.

The Court: I will make the law clear to the Jury at the [7] appropriate time. You simply state what you are required to prove.

Mr. Hoddick: In other words, your Honor and gentlemen of the Jury, we will prove the possession of these drugs; that these drugs did not bear the appropriate tax-paying, taxpaid stamps. And that will be the government's case. And that all of this took place within the City and County of Honolulu, Territory of Hawaii.

The Court: Mr. Kramer, do you wish to ask a question?

Juror Kramer: I'd like to ask him the location of his flag stone. The location of the two houses is confusing. Is the flag stone between them or behind the rear house?

The Court: You wait until you hear the evidence.

Juror Kramer: Thank you.

The Court: And I might caution you now, and this remains true throughout the trial, that the evidence upon which you will found your verdict will come to you from the witnesses who testify or from the documents that may be introduced into evidence, and that statements of Counsel are not evidence until they are in the form of a stipulation or agreement of facts, in which event it will be abundantly clear that that may be accepted as evidence. But Mr. Hoddick's opening statement is simply an outline of what he intends to prove beyond a reasonable doubt. What he has said is not evidence.

Does the defense at this time wish to make its opening [8] statement?

Mr. Landau: We wish to reserve our opening statement.

The Court: Very well. Now, let this also be understood throughout and let's start off by clearing it up right now: Who is going to be in charge of this trial for the defense?

Mr. Soares: Mr. Landau is senior counsel, if

the Court please. I am merely an associate. However, we will probably alternate in the cross-examination and examination of witnesses.

The Court: There will only be one allowed at a time.

Mr. Soares: I understand that to be the rule. And while I am on my feet I ask the Court's permission to leave at the eleven o'clock recess because I have an appointment with my doctor which will keep me there this morning and part of this afternoon.

The Court: Yes. You may have the same freedom that Mr. Fairbanks has.

Mr. Soares: Thank you.

The Court: Without any further comment thereon. And the same applies to the government. Only one counsel at a time. Very well. You may call your first witness.

Mr. Hoddick: Sergeant Richard Sasaki.

### RICHARD SASAKI

a witness in behalf of the Plaintiff, being duly sworn, testified as follows: [9]

#### Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: My name is Richard Sasaki.

The Court: Age?

The Witness: 32 years.

The Court: You live here in Honolulu?

(Testimony of Richard Sasaki.)

The Witness: Yes, sir.

The Court: You are obviously connected with the Honolulu Police Department.

The Witness: Yes, sir.

The Court: And in what capacity?

The Witness: Motor patrolman.

The Court: And you are a citizen of the United States?

The Witness: Yes, your Honor.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

Q. (By Mr. Hoddick): Sergeant Sasaki, how long have you been with the Honolulu Police Department? A. A little over nine years.

Q. And in July of 1949 in what branch of the Honolulu Police Department were you serving?

A. Vice division, gambling detail. [10]

Q. How long have you served in the vice division at that time? A. Served about two months.

Q. Do you know the Defendant, Winston Churchill Henry? A. Yes, sir.

Q. Will you point him out for the Court and Jury?

A. He is in the back of Mr. Soares there, the maroon jacket.

Mr. Hoddick: May the record show that Mr. Sasaki has identified the Defendant?

The Court: Yes.

Q. Did you have occasion to see the Defendant at any time during the month of July?

(Testimony of Richard Sasaki.)

A. Yes, sir.

Q. And where did you see him?

A. Saw him at 803 Hausten Street.

Q. And what was that date?

A. July, about July 16th?

Q. 1949? A. 1949.

Q. And in what city and county is 803 Hausten Street? A. Hon.

Q. That is in the Territory of Hawaii?

A. Yes, sir.

Q. And for what purpose did you go to 803 Hausten [11] Street?

Mr. Soares: We object to that, if the Court please, the witness' undisclosed purpose is not evidence. Let him testify to the facts, what he did. The purpose will then be determined by the Court and Jury.

The Court: All right.

Q. (By Mr. Hoddick): With whom did you go to 803 Hausten Street?

A. I went there with Mr. Wells, U. S. Narcotics, and Captain Whitford, Sergeant Kinney and Sergeant Sousa.

Mr. Landau: Sergeant who?

The Witness: Kinney.

Q. (By Mr. Hoddick): And where had you been immediately before going to 803 Hausten Street?

A. We started off, we met at the Police Station at about 8:15; we left in Mr. Wells' car and we went

(Testimony of Richard Sasaki.)  
to the Drier Manor. Then Captain Whitford gave instructions to—

Mr. Soares: We object to any hearsay, if the Court please, or the result of any hearsay.

Q. (By Mr. Hoddick): Just tell what you did, Sergeant Sasaki?

A. After meeting there I went over with Mr. Wells to the service station on South Beretania Street and borrowed a friend's car. Then we returned back to the Drier Manor, [12] and Mr. Wells, Captain Whitford, Sergeant Kinney and Sergeant Sousa and I went on that borrowed car to a residence right next to 803 Hausten Street.

The Court: Excuse me. Who went with you on this borrowed car?

The Witness: Mr. Wells, Captain Whitford, Sergeant Kinney and Sergeant Sousa.

Q. About what time was this that you went to the residence next to 803 Hausten Street?

A. It was a little after nine, I believe.

Q. What happened after you got there?

A. Mr. Wells, Captain Whitford and I went to the apartment next to 803 on the mauka side. I believe it's 807 Hausten Street.

Q. Did you know the person who lived in that apartment?

A. I happen to know the lady living there and I asked her permission to go into her place to observe things that were going on at 803 Hausten Street. She gave us permission to go in there and

(Testimony of Richard Sasaki.)

we stayed there, and Sergeant Sousa and Sergeant Kinney were in the other half of that duplex apartment. Then we stayed there for quite a while. Maybe it was about two hours or two hours and one-half. And Charles Montgomery drove up in a black Packard sedan and parked it right in front of 803 Hausten Street on the sidewalk area.

Q. Sergeant Sasaki, would you describe the premises [13] of 803 Hausten Street?

A. There is a two-storey house in the front and there is another one in the back, two-storey affair. There is no driveway leading into the place. That's why Charles Montgomery parked his car in the sidewalk area there.

Q. Is there a sidewalk?

A. There is no sidewalk. It's grass.

Q. Is there any kind of enclosure around these two houses?

A. There is a tile wall about four to five feet high.

Q. Does that go completely around them?

A. Completely around.

Q. Does it go in the front, too?

A. I don't know whether it was in the front or not, but it was around the sides and back.

Q. Is there anything that separates the two houses on that lot?

A. Oh, there's quite a space in between and there's a small stream running across the property there. You have to cross a small little bridge or

(Testimony of Richard Sasaki.)

walkway, whatever you call it, to get to the other house.

Q. What happened after you had waited in these premises of 807 Hausten Street for two to two and one-half hours?

A. After Charles Montgomery got off the car he went to the rear house, the house in the back of 803 Hausten [14] Street. And in the meantime—I think her name was Dolores Allen—two girls came out and came out and walked mauka on Hausten Street. And after a short while, about ten minutes, they came back again. Then a short while later they went up again and came back with some clothing or some clean clothes. I believe it was wrapped up in paper or something like that. Then after they went into the back house, the rear house, they came out again on a bicycle and they rode off. They were riding around on Hausten Street. And then at about 12—it was shortly after 12:30—Mr. Wells was looking through the window and saw—

Mr. Soares: Just a minute.

Q. (By Mr. Hoddick): You testify, Sergeant, to what you saw, what you experienced.

A. Well, I was told by Mr. Wells—

Mr. Soares: We object to any hearsay, if the Court please, what Mr. Wells told him.

The Court: Only testify as to what you did, you saw, you heard yourself, not what somebody else—

(Testimony of Richard Sasaki.)

The Witness: I saw——

The Court: You wait. You answer the question.

Q. Sergeant Sasaki, did you go back to the house in the rear of 803 Hausten Street?

A. Yes, sir, after a while. [15]

Q. And with whom did you go back there?

A. I went back there with Mr. Wells, Mr. Henry, Captain Whitford, Sergeant Sousa and Sergeant Kinney.

Q. Did you see Mr. Henry before you went back to the house?

A. I saw him just walking out of, on the side of the front house, 803 Hausten Street, and going into his car.

Q. And what happened at that time?

A. Mr. Wells and Captain Whitford went out from that apartment we were in and I knocked on the wall to signal Sergeant Sousa and Sergeant Kinney to come out, and we were right behind Mr. Wells and Captain Whitford. And Mr. Wells went over to Mr. Henry—Mr. Henry was just about to get into the car.

Q. Into which car is this?

A. There was a black Packard sedan that Charles Montgomery drove up in. And Mr. Wells had a paper in his hand. I believe it was——

Mr. Soares: We object to what the witness' conclusions were, if the Court please.

The Court: Sustained.

Mr. Soares: And at this point—and I didn't

(Testimony of Richard Sasaki.)

have an opportunity, if the Court please—I'd like to move that the conclusion of the witness that Henry walked to his car be stricken as being a conclusion. [16]

The Court: You may cross-examine him on the point.

Mr. Soares: Save an exception.

Q. (By Mr. Hoddick): Did Mr. Wells hold this paper out to Mr. Henry?

A. He had a paper in his hand, and I was in the back of Mr. Wells, quite—I'd say about 10 feet or somewhere around there. So I didn't know, I couldn't hear what he was saying to Mr. Henry.

Q. Did you hear the Defendant say anything at that time?

A. He said something to Mr. Wells but I don't, I can't hear.

Q. Then you all went back to the house in the rear of 803 Hausten? A. Yes.

Q. And what happened after you got back there?

A. Mr. Henry called for somebody to open the door. And he told us to come in, and we all went into the house. And then Mr. Wells showed him the warrant and Mr. Henry said, well, he knows about the warrant, what a search warrant is like. And Mr. Wells didn't have to read out everything to him.

Q. And then what did he do?

A. Then Mr. Wells and I went upstairs and checked if anybody was up there. And Mrs. Helen

(Testimony of Richard Sasaki.)

Thomas was upstairs, [17] and I told her to come downstairs, she was wanted downstairs. And I stood by in the living room there with Charles Montgomery, Mrs. Helen Thomas, Dolores Allen and another little girl there. And Mr. Wells went upstairs, Sergeant Sousa and somebody else. I stood by there until Officer Marcotte or somebody came in—

Mr. Soares: What is the name of that officer?

The Witness: Marcotte, M-a-r-c-o-t-t-e. Marcotte came in.

A. (Continuing): Marcotte came in, and I told Marcotte to stand by in the living room.

Q. Well, Sergeant Sasaki, did you make any search of the premises?

A. After Marcotte came there, Mr. Wells came downstairs; I went outside in the back of the kitchen, through the kitchen door, and there's a little room there, and I went out there to search the grounds.

Q. And where did you search, in the back of the house?

A. In the back of the house on the mauka, Koko Head end.

Q. And where did you, what did you look under and at back there?

A. I checked, I looked under a pipe that was a laundry pipe to hang the laundry or something, that had wire; and I looked under the concrete there, and there was nothing there. [18] So I checked

(Testimony of Richard Sasaki.)

further. As I was walking makai in the back, in the back of the house, there were three concrete flag stones or something like that, and upon coming to the third flag stone I noticed a slight hole on the side of the flag stone and a little disturbance. So I lifted the slab up and there was a hole under the slab and a bottle, an Ovaltine bottle with some capsules in it.

Q. How big a hole was it?

A. Well, I cannot say exactly how big it was. I think it was about 8 to 10 inches deep and about—

Q. Did you take the Ovaltine bottle out of the hole?

A. Right then Officer Case came around the corner and he noticed me lifting up the slab, and I called his attention that something was in there. And he came over and he saw that bottle. And one of us, I believe it was—

Q. Did Mr. Wells come before you took it out?

Mr. Soares: I object to Counsel interrupting the witness in the middle of his testimony. Let's have his complete answer.

The Court: Had you finished your answer? (to Mr. Soares) You stand up when you address the Court.

Mr. Soares: Beg your pardon.

The Court: Had you finished your answer to the last question? You started to say something and Mr. Hoddick asked you another question. Had you finished your answer? [19]

(Testimony of Richard Sasaki.)

The Witness: I am continuing yet.

The Court: All right. Go ahead, finish your answer.

A. (Continuing): I believe Officer Case yelled out for Mr. Wells and Mr. Wells and Mr. Churchill there and several other vice men came down, came out of the house, and after showing them, Mr. Wells, the bottle there, I was advised to pick the bottle up on the top end of the cover, and I held on to the bottle and followed Mr. Wells and Mr. Churchill and Sergeant Sousa, I believe, upstairs to continue searching the mauka bedroom there. And while I was there I was in view of Mr. Churchill and had that bottle with me at all times. After searching—

Q. Excuse me. Why did you hold the bottle in that fashion?

Mr. Soares: We object to that, if the Court please, the witness' reason for doing any act. It is not evidence, if the Court please. It will be argumentative.

The Court: Overruled.

Mr. Soares: Save an exception.

The Court: Granted.

A. I held the bottle on top. The reason why I held it there is not to smear the bottle for later taking of prints, possible prints on the bottle.

Q. Now, when you found the bottle in this hole under the concrete paving stone, Sergeant Sasaki, did Mr. Henry [20] come out there before you took the bottle out of the ground or not?

(Testimony of Richard Sasaki.)

A. Mr. Henry and Mr. Wells and several others came out. I didn't touch the bottle until they all came there.

Q. And then you took the bottle upstairs?

A. Yes, sir.

Q. And what happened after that?

A. Searched—after waiting for Mr. Wells and several of the boys, who were searching the mauka bedroom, then after they got through we went to the makai bedroom. And I believe in the meantime Officer Case called out again that he had something. He found something. And we all went downstairs and there was a small little bottle, a clear bottle.

Mr. Soares: What kind of bottle?

The Witness: Small, clear. It is not white but it is clear. You can see right through that bottle. It had some white, something like salt in it.

Q. (By Mr. Hoddick): Sergeant Sasaki, did you ever turn the bottle that you found over to anybody else?

A. No, I didn't until I turned it over to Mr. Wells later on.

Q. And where did you do that?

A. That was in a small little room on the mauka side of the kitchen, adjoining the kitchen. [21]

Q. And what took place at the time you turned the bottle over to Mr. Wells?

A. Mr. Wells, in Mr. Churchill's presence, counted the capsules, the number of capsules in the bottle.

(Testimony of Richard Sasaki.)

Q. And how many were there?

A. There were 915 capsules.

Q. And then what was done with the capsules?

A. The capsules were put back in the bottle and I got the cover and covered it up. The capsules were put back and I believe we covered it or—I'm not sure of that, whether I covered it before Lieutenant Fraga came down to take the prints of the bottle.

Q. Was there any substance in these capsules?

A. There was; the capsules were filled.

Q. Did you put any identifying marks on this bottle?

A. After sealing it again, I put my initials on it, R.H.S.

Q. In your presence did anybody else put any identifying marks on the bottle?

A. I believe Officer Case, somebody there, put their initials on it.

(Mr. Wells opens a large envelope, extracts a bottle, and hands same to Mr. Hoddick.)

Mr. Hoddick: May I have this marked as the government's first exhibit for identification purposes? [22]

The Clerk: Government's Exhibit No. 1 for identification.

(The bottle referred to was marked "U. S. Exhibit 1 for Identification.")

Q. (By Mr. Hoddick): Showing you govern-

(Testimony of Richard Sasaki.)

ment's No. 1 for identification purposes, Sergeant Sasaki, can you identify it? A. Yes, sir.

Q. What is it?

A. This is the Ovaltine bottle that I found in the, with the 915 capsules that we counted and I initialed it in here, R.H.S.

Q. Your initials appear on government's Exhibit No. 1? A. Yes, sir.

Q. Where was that flag stone located with reference to the rear house at 803 Hausten Street?

A. That is, it was in the rear of that house on the Koko Head side of the house.

Q. How close to the house?

A. It's only a few feet away from that, from the wash house extending in the back of the rear house.

Q. Now, was there any change in the condition of government's Exhibit No. 1 from the time you found it until the time you gave it to Mr. Wells?

A. There was no change from the time—

Q. From the time you found it until you gave it to [23] Mr. Wells.

A. There was no change.

Mr. Hoddick: May I have this marked as government's Exhibit No. 2 for identification purposes? (Showing a photograph.)

The Court: It may be marked.

The Clerk: U. S. Exhibit No. 2 for identification.

(Testimony of Richard Sasaki.)

(The photograph referred to was marked "U. S. Exhibit No. 2 for Identification.")

Q. (By Mr. Hoddick): Do you have a clear recollection of the place, Sergeant Sasaki, where you found this bottle? A. Yes, sir.

(Mr. Hoddick shows photograph to Messrs. Soares and Landau.)

Q. Showing you government's Exhibit No. 2 for identification purposes, which is a photograph, I ask you if that is a true representation or a true picture? A. It is.

Q. Of the spot where you found the bottle?

A. Yes, sir.

Q. And can you identify the man whose picture appears therein? A. It is my picture.

Q. And what are you holding in your hand? [24]

A. That bottle over there.

Q. And who took the picture?

A. Lieutenant Fraga.

Mr. Hoddick: I should like to offer this in evidence, your Honor.

Mr. Soares: We object to it as incompetent, irrelevant and immaterial, if the Court please. It is not a proper identification in the picture. And the time of the taking is not shown; whether it was posed for the purposes of this case or is a representation of what was seen there does not appear, we submit.

(Testimony of Richard Sasaki.)

The Court: The witness testified that it was a true picture of where he found the bottle.

Mr. Soares: That's all. But there are other things there, if the Court please. I have no objection to the Court's looking at the picture. It could not be a true picture of other things that are represented in there if, as we believe, it was taken subsequent to the time in question.

The Court: I think there should better be a better foundation for that. At the moment I will reject the offer.

Q. (By Mr. Hoddick): Sergeant Sasaki, how long after you found the bottle was the picture taken? A. I don't remember quite well.

Q. Do you remember approximately the time when you [25] found the bottle?

A. I found the bottle at about 12:55.

Q. You remember how soon thereafter Lieutenant Fraga arrived?

A. Lieutenant Fraga arrived just about that time, I believe, about 12:55 or 1:00 o'clock.

Q. Do you know what time you left the premises finally?

A. We left the premises at about 3:00 o'clock or a little shortly after that.

Q. Do you remember approximately how long before you left the premises the picture was taken?

A. I don't remember.

Q. The picture was taken some time before you left the premises?

(Testimony of Richard Sasaki.)

A. Yes, it was taken before we left the premises.

Q. What kind of a day was it, do you remember? A. I don't remember.

Q. Was there any great change in atmospheric conditions from the time you arrived until the time the picture was taken?

A. Oh, there was—all I know is there was no rain at the time.

Q. Was this stone which you are holding in your right hand in the picture—

A. It is my left hand. [26]

Q. Your left hand?

A. That's the slab that was over that hole there.

Q. Over what hole?

A. The hole where the bottle was placed in.

Q. Were there any other slabs like that in the area?

A. There's two more on the mauka side. It's in the back.

Q. Did you look under those slabs?

A. Yes, I looked under those.

Q. Was there anything under those slabs?

A. There was nothing under them.

Mr. Hoddick: I submit, your Honor, that for the purposes of—one other question.

Q. You posed for that picture, did you?

A. Yes, sir.

Mr. Hoddick: I submit, your Honor, that for the purpose of giving the Jury a better idea than words can give them of the scene where Sergeant

(Testimony of Richard Sasaki.)

Sasaki found this bottle, this picture is probably admissible in evidence. He has testified that it is a true representation of the scene at the time the picture was taken; that the stone which he is holding is the stone which covered the hole where the bottle was found; the bottle in his hand is the bottle which he found there.

Mr. Soares: Well, it also appears in the evidence that other people handled the bottle. The bottle had been opened. [27] Things had been done to it. And in addition to the other grounds heretofore urged, it is accumulative. He has described what happened.

The Court: Overruled.

Mr. Soares: Save an exception.

The Court: The document may become—

The Clerk: U. S. Exhibit "A" in evidence.

(The photograph referred to was received in evidence as "U. S. Exhibit A.")

(Mr. Hoddick shows exhibit to the Jury.)

Mr. Hoddick: No further questions.

The Court: Before you cross-examine we will take our first recess.

(A recess was taken at 11:00 a.m.)

The Court: You may cross-examine, the Jury being present, as is the Defendant together with his Attorney.

Mr. Landau: I will wait, if the Court please,

(Testimony of Richard Sasaki.)

if I may, until the jurors have all seen the picture that they are now examining.

The Court: You may proceed.

### Cross-Examination

By Mr. Landau:

Q. Now Mr. Sasaki, who else was with you on this occasion on July 16, 1949, at 803 Hausten Street? [28] A. Mr. Wells——

Q. In order to make it easier for you, you have mentioned Mr. Wells, Sergeant Sousa, Sergeant Kinney, and Captain Whitford. Who else?

A. You mean between the time we got there and the time we left there?

Q. Who else went there with you?

A. Just Mr. Wells, Sergeant Sousa, Sergeant Kinney, and Captain Whitford and myself.

Q. All right. Then you say that you saw a man by the name of Montgomery driving a black Packard sedan, park it in front of the front house on the grass? A. Yes, sir.

Q. Now, at that time you were where?

A. I was still in the house on the mauka side of that address.

Q. Were you five there together?

A. Mr. Wells, Captain Whitford and I were in the apartment.

Q. And Kinney and Sousa?

A. Was in the next apartment.

(Testimony of Richard Sasaki.)

Q. I see. You were, in other words, the five of you were in somebody's home?

A. Yes, sir.

Q. Was there anybody else there, any other police [29] officer? A. No, sir.

Q. All right. Then you say you saw the Defendant in front of the front house near the black Packard? A. Yes, sir.

Q. Now, at that time were you five there alone or were there other members of your department there?

A. There was no other member there.

The Court: Speak loud so everybody can hear you.

Q. Now, when did any of the other officers arrive at the scene?

A. They arrived—I'm not too sure—about 10 or 15 minutes later.

Q. Was that after you had gone into 803 Hausten Street? A. Yes, sir.

Q. And who was it that came along at that time?

A. I don't quite remember who came in at the time.

Q. Well, did these other officers come together or did they come at different times?

A. Some of them came in shortly after that, I remember, after a period of, I believe, a couple of others came in.

Q. You don't know who came nor when they came?

(Testimony of Richard Sasaki.)

A. I know who came in but I cannot say what time it was. [30]

Q. You mean you know who was there when this was all over, is that what you want to say?

A. No, it wasn't all over yet.

Q. All right. Let's put it this way: After you had come into 803 Hausten Street, with Mr. Wells, you went upstairs? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And there you found a lady by the name of Helen Thomas? A. Yes, sir.

Q. Now, how long did you stay upstairs?

A. Just a few seconds.

Q. In other words, you didn't make any search upstairs? A. No, sir.

Q. Did you know that there was anybody upstairs when you went up there?

A. Helen Thomas was up there.

Q. When you went upstairs, did you know that she was there?

A. When I went up I saw her there.

Q. But before you went up, did you know she was upstairs?

A. I didn't know whether anybody was upstairs. [31]

Q. What's that?

A. I didn't know whether anybody was upstairs.

Q. You didn't know? But you went upstairs nevertheless? A. Yes, sir.

Q. You did not make a search?

(Testimony of Richard Sasaki.)

A. No, sir.

Q. And as soon as you saw Helen Thomas there you asked her to come down? A. Yes, sir.

Q. And she did come down? A. Yes, sir.

Q. And you immediately thereafter?

A. What?

Q. And you came down immediately thereafter?

A. Yes, sir.

Q. Now, do you remember what bedroom Helen Thomas was in?

A. I am not sure what room she was in. Vaguely I think she was in the makai bedroom.

Q. Well, that was the first bedroom you went to, is that correct? A. Yes, sir.

Q. And you headed directly up for that bedroom and you saw her there and you told her to come down? [32]

A. Not particularly to that bedroom. I just went upstairs and I noticed her from the doorway that she was in there.

Q. But you didn't look anywhere else, is that correct?

A. Well, I asked her if there was anybody else, and she said nobody else is upstairs, so I came down with her.

Q. So you took her word for it and came right down? A. Yes, sir.

Q. Now, after you came downstairs, did you then immediately go out to the back of the house?

A. No, sir. I was in the living room.

(Testimony of Richard Sasaki.)

Q. And how long did you stay there?

A. About 10 to 15 minutes.

Q. And I understand you to say you sat in the living room? A. Yes, sir.

Q. And who was in the living room with you at the time?

A. Mr. Montgomery, Mrs. Helen Thomas, Dolores Allen, and a little girl there.

Q. After you had been there 10 or 15 minutes chatting in the living room, you then went out to the back?

A. Yes, I went to the back through the kitchen and out the back door. [33]

Q. And the first thing you did when you got outside was to search around the pipe where the laundry lines were situated, is that correct?

A. It was tilted already and it has a concrete base. There was a hole underneath.

Q. I see. And you went there directly from the house? A. Yes, sir.

Q. Is that correct? A. In the back there.

Q. And you got out there and you looked around at that concrete base and you found nothing?

A. Nothing there.

Q. And then you saw these concrete flag stones, is that correct? A. Yes, sir.

Q. And you lifted one up, is that correct?

A. Yes, sir.

Q. And under the one that you lifted was the hole with the bottle in it? A. Yes, sir.

(Testimony of Richard Sasaki.)

Q. Now, at the time that you lifted this flag stone and you found, you say, this bottle, was the bottle in this condition, Mr. Sasaki?

A. It was wrapped around like that.

Q. With tape all around it? [34]

A. No, the same plaster that's on it there.

Q. It was taped around the bottle, the top of the bottle, and over the top?

A. Just as it is except for that other piece there that was right around, excepting for this piece around.

Q. In other words, the piece of tape went completely around it? A. Yes, sir.

Q. But otherwise it was in the same condition?

The Court: What piece of tape?

Mr. Landau: This piece of tape. (Indicating.)

The Court: Oh.

Q. Is that the only change, Mr. Sasaki, between what you found, the manner in which you found it, and the condition that it is today?

A. Yes, sir.

The Court: You will have to speak louder so we can hear you. The lawyers have to hear you and the 12 jurors have to hear each word you say, so make your answers loud enough so we can hear each word. I understand your answer to that was yes.

The Witness: Yes, sir.

Q. Now, Mr. Sasaki, the thing that struck you immediately was that you pulled up this slab and

(Testimony of Richard Sasaki.)

looked at the bottle, was that it was an Ovaltine bottle, is that correct? [35] A. Yes, sir.

Q. Now, looking at that picture, Mr. Sasaki, I ask you if this does not indicate—strike that. What is this white substance around the bottle?

A. That's that wax paper.

Q. The wax paper?

A. It wasn't completely around.

Q. You say it was not completely around?

A. No.

Q. But it covered that pretty well, did it not?

A. Just on this portion here, like that, the way it is there. (Indicating.)

Q. You say that the bottle was covered about the same way it is today in this courtroom?

A. Except for that plaster around it.

Q. Now, you are certain that except for the plaster which—

The Court: I can't hear you. And don't talk while you are being asked a question. Let's start over again. Listen to the question.

Q. Except for the tape which is partly wedged together here and which at that time went completely around the bottom of the bottle, the condition is exactly the same?

A. Except for a little of this wax paper was down here.

Q. All right. Now, you have added a little additional [36] feature. Tell me how much of the wax paper covered the bottle?

(Testimony of Richard Sasaki.)

A. Just about what it is now here.

Q. Are you sure about that, Mr. Sasaki?

A. As far as I can recollect.

Q. Well, now, looking at the picture, this posed picture in which you are holding the bottle, I ask you whether or not this picture does not show considerably more of the wax paper covering that bottle?

A. The paper could be on this side, but on the other side it is about the same.

Q. Well, now, let's turn this bottle around slowly. You have seen all sides of that bottle now, have you? A. Yes, sir.

Q. And I ask you now whether this posed picture of you does not show considerably more of that Ovaltine bottle covered by the wax paper than you had identified today?

A. Well, the picture shows only on one side.

Q. That's why I turned the bottle around completely. You show me one side which corresponds to this picture?

A. It should be on this side here. (Indicating.)

Q. Now, look at that picture, please. Does that picture show the bottle is more covered than that?

A. Slightly more than this.

Q. Slightly more? Now, look at it, please. And you [37] just say slightly more? A. Yes, sir.

Q. Now, as a matter of fact, you went directly to the cement at that laundry pole and to the cement on the walk because somebody had tipped you off

(Testimony of Richard Sasaki.)

that you'd find some stuff under the concrete, isn't that the fact? A. No, sir.

Q. But you did nevertheless go directly to those spots which I have mentioned?

A. The reason—

Q. Just answer my question. You did go there, didn't you? A. No, sir.

Q. Didn't you tell me that you immediately went out to the back and went to the laundry pole and looked around the cement there and that was the first thing you did? Didn't you so tell me?

A. I glanced over across there and I noticed that.

Q. You did go to the laundry pole the first thing, didn't you?

A. After not seeing anything outside there, I went over there. I saw that the ground was all clear.

Q. In other words, you saw no other cement on the ground, is that what you want us to believe?

A. On that side of the house? [38]

Q. Yes. A. Yes, sir.

Q. I see. So you went to the first place where you did see some cement and that was where the laundry pole was? A. Yes, sir.

Q. Then you looked around there and you saw nothing there, is that correct?

A. Well, I checked the tree there. There was a tree.

Q. Wait a second. Answer my question. You

(Testimony of Richard Sasaki.)

checked around the foot of the base of this laundry pole? A. Yes, sir.

Q. And then you went to the flag stone, isn't that what you told the jury a few minutes ago, Sasaki? A. Now I remember.

Q. Now you remember something else?

A. No I remember.

Q. Let's see what else you remember?

A. There was—I don't know whether it is an incinerator or something like that, made out of bricks or something of that sort in the back there, a fireplace or something.

Q. You looked there?

A. I looked there first.

Q. You didn't find anything there?

A. No, sir.

Q. Then you went to the flag stone? [39]

A. I checked all around there on the side and finally came to the flag stone.

Q. In other words, your search—you looked around and saw no other cement, isn't that correct?

A. There's two more other blocks there.

Q. Yes, I know there are two other blocks. There are three blocks there together.

A. Yes, sir.

Q. But after you got through searching the incinerator you looked around and saw these cement blocks, isn't that right? A. Yes, sir.

Q. And you went to the first one—strike that. You went to one and lifted it and there was the bottle?

(Testimony of Richard Sasaki.)

A. I didn't go to that. I checked the first two first and I didn't see any disturbance around it so upon glancing on the third one I saw a disturbance on the side of it, so I lifted it up.

Q. Well, didn't you tell the jury just a few minutes ago, in answer to my question, that you went immediately to the cement block and you lifted it up and you found—

A. I didn't go immediately.

Q. I am asking you, didn't you tell me and the jury and the Court that just a few minutes ago?

A. I didn't say I went immediately there. [40]

Q. And didn't you say, Mr. Sasaki, that it was under the first block that you looked at?

A. No, sir.

Q. You deny that, Mr. Sasaki?

A. I looked upon—

Q. Just answer my question. You deny that you told the jury that?

A. I may have said that.

Q. You may have said that?

A. I am not sure.

Q. Now, you testified before the U. S. Commissioner on this matter some months ago, did you not, Mr. Sasaki? A. Yes, sir.

Q. And you remember that the U. S. Commissioner was Magistrate Harry Steiner?

A. Yes, sir.

Q. And you gave the testimony there on August 17, 1949, in his office in the District Court of Honolulu? A. Yes, sir.

(Testimony of Richard Sasaki.)

Q. Now, at that time did you say anything—strike that. At that time, isn't it a fact that you said absolutely nothing about Lieutenant Fraga taking the prints off that bottle?

A. The question again?

The Court: Where has there been testimony that there [41] were prints taken?

Mr. Landau: He testified on direct examination, if the Court pleases, that Lieutenant Fraga came to take prints off the bottle.

The Court: Well, his testimony was that he held the bottle in a certain way so that Lieutenant Fraga could take prints. There was no testimony that he did take any prints.

Mr. Landau: It was after Mr. Wells had counted the capsules he stated, and put them back in the bottle, this witness stated that Lieutenant Fraga came down to take the prints off the bottle.

The Court: Yes, but there is no testimony that he did take any prints, which your question implies. This witness has never testified that anybody took any fingerprints off the bottle but that he was holding it in that way so they could be taken.

Mr. Landau: All right.

Q. At that hearing you didn't say anything about Lieutenant Fraga having appeared to take the prints off the botte, did you?

A. I won't deny it.

Q. You wouldn't deny it? A. No.

Q. Your memory as to what had occurred and

(Testimony of Richard Sasaki.)

all the facts was clearer at that time than it is today, of course? [42]

A. It wasn't as clear as the day we went to the place.

Q. No, but at that time, August 17th, it was clearer than it is today?

A. It could be clearer. I am not sure about that.

Q. Now, you say the reason you picked up this particular flag stone is because you saw a hole, isn't that right? A. Yes, sir.

Q. Now, let me ask you whether or not you remember this question which was asked you by Mr. Hoddick:

“Question. Where did you find that bottle?

“Answer. In the rear of the house under a concrete slab. There was a hole dug under the concrete slab and it was the bottle—the bottle was placed in the hole.

“Question. Was that hole visible when you looked at the slab?

“Answer. No, it is not.”

So I therefore take it you testified you saw no hole?

A. I believe—

Mr. Hoddick: Excuse me. Is there a question here?

The Court: I didn't hear any. What is your question? You are concluding in your statement that what his testimony there was that he is now here to answer the question based on what you read. What is your question?

(Testimony of Richard Sasaki.)

Q. Do you remember testifying to that effect? [43]

A. I remember vaguely saying that there was a disturbance on the side of it.

Q. You deny that when Mr. Hoddick asked you the question, was that hole visible when you looked at the slab, that your answer was, "No, sir, it is not"?

A. I said there was a disturbance.

Q. I say, whether you deny making that answer to the question at that time put to you by Mr. Hoddick?

A. I won't deny what I said at the time.

Mr. Hoddick: We will stipulate that he did.

Mr. Landau: I don't want any stipulation from Counsel, if the Court pleases. I think it is unfair. I am asking this witness a question.

The Court: You don't need to accept his stipulation.

Mr. Landau: But I don't think it is fair for Counsel to come in and say we will make a stipulation. I am examining this witness on cross-examination.

The Court: Go right ahead.

Mr. Landau: May I have the last question and answer?

(The reporter read the last question and answer.)

Q. Your memory at that time was better than it is today, isn't that correct, Mr. Sasaki?

(Testimony of Richard Sasaki.)

A. Well, it could have been—it wasn't too far off from the time the arrest was made.

Q. So that what you testified there before the U. S. [44] Commissioner was more in keeping with your memory of it as it actually happened?

A. Well, I can recall after talking over with the boys what happened, I can recollect now more things that happened. I may have missed—

Q. In other words, you now remember more things about this incident than you remembered on August 17th, is that correct?

A. I could recall.

Q. In other words, your memory is better today than it was on August 17th?

A. I won't say that my memory is better.

Q. But you did say you can recall more things today than you could then, is that what you said?

A. I said I could by reviewing the things with the boys in the last few days, I could recall more.

Q. I see. You mean that you and the boys got together and talked about this case and now you remember more things, is that right?

A. It's been quite a while and some of the things I missed I could get back.

Q. August 17th, it was about a month after this raid wasn't it? A. Yes, sir.

Q. How was your memory then, pretty good? [45]

A. I'd say it was all right.

Q. But in the last few days you and the rest of

(Testimony of Richard Sasaki.)

the witnesses have talked this case over with one another and you have been refreshed as to some other factors?

A. I talked over with Mr. Hoddick then.

Q. I know. You also said you talked with some of the boys?

A. Yes, sir, the boys that were on the raid.

Q. That's right.

A. To refresh our memories.

Q. So now your memory is better because you talked over the case with the boys?

A. Not only that. When you stated about that concrete slab, I completely forgot about that brick fireplace, and since you brought up that stuff I recollect that there was something like that.

Q. In other words, your memory today is better than it was on August 17th?

A. I won't say it's better.

Q. But you can remember more things about it than you did then?

A. As the case goes on I can recollect.

Q. Now you have, in answer to but not direct answer, to some of my questions you said there was a disturbance. Giving you the benefit of all the doubt, will you tell us [46] what that disturbance was?

A. It is dirt there and somebody has done something to the dirt, and you can more or less tell.

Q. And you can see that without lifting the slab?

A. Yes, sir.

(Testimony of Richard Sasaki.)

Q. In other words, it was on the ground? There was something on the ground, the dirt itself, that called your attention and nothing on the slab?

A. Not on the slab.

Q. All right. Now, let me ask you if you remember being asked this question by Mr. Fairbanks at that same place and time. You answered there was a hole in the slab, and the question was,

“Well, you didn’t know when you looked at it?” Your answer was,

“When I checked there were three concrete slabs there. When I checked, when I looked at those three I saw a slight mark on the one that I turned over.” Wasn’t that your answer, Mr. Sasaki, at that time?

A. I won’t say—I believe I told him there was a slight disturbance, a mark on the side of it.

Q. Now, Mr. Sasaki, do you remember this answer? “When I checked there were three concrete slabs there. When I checked, when I looked at those three I saw a slight mark on the one that I turned over.” [47] You remember that answer? Do you deny making that answer?

A. I won’t deny making it.

Q. Is it possible that you did give that answer?

A. I could have given that answer.

Q. We got sidetracked a little bit, Mr. Sasaki. I was asking you about when the other police officers

(Testimony of Richard Sasaki.)

came. Now, with reference to the time that you went outside of the house, had any other police officers arrived?

A. Officer Marcotte and I think a couple of others came in. So I told Marcotte to stand by.

Q. Do you know who the others were?

A. I don't recollect who it was.

Q. Well, you mentioned that Mr. Case was there. Was he there at the time or had he come before or after that?

A. Case came after, when I was just about, just about lifting up the slab up.

Q. Well, what was Mr. Case doing at the time, if you remember?

A. I believe he was checking on the side, makai side of the house, and he just came around the corner.

Q. In other words, the first time you saw him that morning is when he happened to bump around the corner, came around the corner, is that correct?

A. No, sir, I saw him at Drier Manor.

Q. Well, now who was at Drier Manor? [48]

A. Case, Pestano, Ferry, Mr. Wells, Sousa came in, myself.

Q. Well, in other words, everybody who finally got there before you broke up and went home, were all at Drier Manor?

A. Excepting for Lieutenant Fraga and Chief Liu, as far as I can remember.

Q. In other words, you were all there, but five of

(Testimony of Richard Sasaki.)

you came down and stayed there about three hours, two to two and one-half hours, is that correct?

A. Yes, sir.

Q. And then, after you got in there, a few more came on the scene.

A. After we got in there, I think it was Captain Whitford went up to us to telephone, to call the rest of them.

Q. I see.

Mr. Landau: I believe that's all, if the Court please.

The Court: Where did Marcotte come from?

The Witness: He was—I don't know where he came from, but he was at Drier Manor when we left, Mr. Wells, Sergeant Sousa and I left. They were still there in the Drier Manor at that time.

The Court: Then Marcotte was in the Drier Manor with Case, Pestano and Ferry? [49]

The Witness: He could have been there or somewhere else after that.

Mr. Landau: No questions.

The Court: Redirect?

#### Redirect Examination

By Mr. Hoddick:

Q. Sergeant Sasaki, there has been talk about Lieutenant Fraga coming to take some fingerprints. Did he test that bottle for fingerprints in your presence?

(Testimony of Richard Sasaki.)

A. Yes, in my presence and Mr. Wells'. There were several others.

Q. Who handed the bottle to Lieutenant Fraga?

A. I did.

Q. And did he hand it back to you?

A. Yes, sir.

Q. Were you present all the time that Lieutenant Fraga was testing it? A. Yes, sir.

Q. Did he open the bottle? A. No, sir.

Q. Mr. Landau has referred to the Commissioner's hearing and a question which I asked you was—

“Was that hole visible when you looked at the slab?” You understand the meaning of the word “visible”?

Mr. Landau: If he didn't, if the Court pleases, this [50] isn't the time to find out. He answered the question then in August.

The Court: What is the question, Do you now understand the meaning of the word “visible”? Or did you then?

Mr. Hoddick: Well—

Q. Did you then understand the meaning of the word “visible”?

A. I could have mistaken the question.

Q. When you answered that question, what hole did you have in mind?

Mr. Landau: I object, if the Court please. The question and answer apparently speak for themselves. This isn't the time to try to get some ex-

(Testimony of Richard Sasaki.)

planation to some testimony which he gave in August.

The Court: I think it speaks for itself. It is argumentative.

Mr. Hoddick: No further questions.

Mr. Landau: That's all. Oh, just one question. I'm sorry.

Q. (By Mr. Landau): You didn't at the Commissioner's hearing tell the Commissioner and the attorneys there anything about Lieutenant Fraga testing the bottle for fingerprints?

The Court: Was he asked?

Mr. Landau: Counsel just asked him that question. [51]

The Court: No, he asked him that question in this case, but you are asking him if he told anything in that case. Well, let's find out if he was asked anything first at the Commissioner's hearing. If he wasn't asked, there is no occasion for such a question.

Q. (By Mr. Landau): You mentioned Lieutenant Fraga in your testimony down there, didn't you, Mr. Sasaki? Well, I will withdraw it.

The Court: All right. You are excused.

(Witness excused.)

The Court: Next witness. We might as well get his pedigree. We can do that in five minutes.

Mr. Hoddick: Roy Case.

## ROY F. CASE

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

The Court: Will you please state your name?

The Witness: Roy F. Case.

The Court: Age?

The Witness: Thirty years.

The Court: Residence?

The Witness: 3066 Kolowalu Street, Honolulu.

The Court: Occupation?

The Witness: Police officer.

The Court: Honolulu Police Department?

The Witness: Yes, sir. [52]

The Court: You are a citizen of the United States?

The Witness: I am.

The Court: Exclusively?

The Witness: Exclusively.

The Court: Take the witness.

## Direct Examination

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Mr. Case?

A. Since September 18, 1945.

Q. And in July of 1949 with what branch of the Honolulu Police Department were you serving?

A. In the vice division.

Q. How long have you been on the vice squad at that time? A. One year.

(Testimony of Roy F. Case.)

Q. Do you know the defendant, Winston Churchill Henry? A. Yes, I do.

Q. Will you point him out, please?

A. Sitting there with the purple, lavender jacket on.

Mr. Hoddick: Let the record show that he has identified the Defendant.

The Court: The witness is color-blind.

Mr. Laudau: He identified the Defendant but not the color. [53]

The Court: I would agree.

Q. (By Mr. Hoddick): Do you have any trouble with your eyesight, Mr. Case?

A. No, sir. That's maroon.

Q. Did you have occasion to go to 803 Hausten Street—withdraw that question. Did you have occasion to see the Defendant during July of 1949?

A. Yes, I did.

Q. And where did you see him?

Mr. Landau: You mean any time during July?

Mr. Hoddick: I will fix the date.

Q. Where did you see him during July?

Mr. Landau: He might have seen him every day of the week, every period during the month.

Mr. Hoddick: Let him answer the question.

A. I saw him at 803 Hausten Street.

Q. And what date was that? A. July 16th.

Q. About what time of the day, Mr. Case?

A. At 1:08 p.m.

Q. Where were you prior to going to 803 Hausten Street?

(Testimony of Roy F. Case.)

A. At the Barbecue Inn on Kalakaua Avenue.

Q. And what were you doing there?

A. On instructions of Captain Whitford I was to assist [54] Mr. Wells and I had instructions to remain at the Barbecue Inn on Kalakaua Avenue and observe Mr. Churchill's residence at 408 Keanianu Street.

Q. Why did you go over to 803 Hausten?

A. I received a phone call that I was needed there to assist Mr. Wells and other officers in searching for narcotics on the premises in 803.

Q. What happened after you arrived at 803 Hausten?

The Court: We will stop at this point for our noon recess. I will take a noon recess now until two o'clock.

(The Court recessed at 12:00 noon.) [55]

### **Afternoon Session**

The Court: Now back to Criminal 10253. The jury is present as is the defendant, together with the attorneys.

### **ROY F. CASE**

resumed the stand and testified further as follows:

The Court: You are Mr. Case, the same witness who was sworn earlier in this case today?

The Witness: Yes, sir.

The Court: I remind you that you are still under oath. You may proceed with your direct examination.

(Testimony of Roy F. Case.)

Mr. Hoddick: Will you repeat the last question and answer, please?

The Court: You were about to ask him what he did when he got to a certain numbered place on Hausten Street, he having just testified that he left the Barbecue Inn on Kalakaua in response to some message from Captain Whitford, I believe.

The Witness: Yes, sir.

Direct Examination

(Continued)

By Mr. Hoddick:

Q. Mr. Case, will you relate what happened after you arrived at 803 Hausten Street?

A. Yes, sir. As I entered the premises and walked along the makai side of the house towards the rear, and just as I rounded the makai Koko Head corner of the house, I seen [56] officer—Sergeant Sasaki lifting up a cement stone, flagstone, and I walked over to him, and there was a bottle that was labeled "Ovaltine." It had been laying away underneath this stone. And upon seeing this I called to Mr. Wells, who immediately came out to the location, and we looked at the bottle, the contents.

Q. Did Mr. Henry come with Mr. Wells?

A. Yes, he did. And Officer Sasaki received instructions from Mr. Wells to keep the bottle in his possession and its contents, and I continued to search the area in the rear of that location.

(Testimony of Roy F. Case.)

Q. Mr. Case, did you later see this bottle again?

A. Yes, sir, I did.

Q. Did you place any identifying marks on that bottle? A. Yes, I did.

Q. Showing you Government's Exhibit No. 1 for identification purposes, I ask if this is the bottle which you saw Sergeant Sasaki take out from under the stone slab?

A. I can tell if I find my initials. Here they are here, "RFC."

Q. Thank you. You say you continued your search?

A. Yes, sir, I did.

Q. And what were you searching for?

A. I was searching for narcotics.

Q. And where did you research? [57]

A. I searched the area or the, that is the immediate area in the rear of that location, back yard of 803 Hausten Street and the open patio there. I noticed a canvas sun couch, and upon lifting up the pillow, or head rest—it just lifts up and folds back—a small bottle dropped down and fell onto the seat part of the couch.

Q. Will you describe that bottle?

A. Yes, sir, it was white, about two inches high and it had—its contents were what I suspected to be cocaine.

Mr. Landau: Objected to and ask that it be stricken, if the Court please, and that this witness be instructed to describe the color and substance if

(Testimony of Roy F. Case.)

he wishes, and by any name is highly improper at this time; and ask the jury to be instructed to disregard it.

The Court: What the witness suspected it was is not evidence of what it was; therefore that expressed suspicion of his is stricken and the jury instructed to disregard it.

The Witness: It was a white bottle approximately 2 inches high.

Q. (By Mr. Hoddick): Mr. Case, do you mean that the bottle, the glass part itself, was white?

A. Yes. The contents therein were also white crystal form, looking something like epsom salts.

Q. Could you see through the bottle?

A. Yes, sir, I could. It had a cork stopper and a [58] piece of paper wrapped around the cork.

Q. And what did you do with that bottle?

A. I immediately called to Mr. Wells, who came out of the house with Mr. Churchill, and I picked the bottle up.

Q. When you say "Mr. Churchill," you mean the defendant?

A. Mr. Winston Churchill Henry, yes, sir. Picked the bottle up and showed it to Mr. Wells. I received instructions to take it with me wherever Mr.—the defendant went and keep it in his presence. And we then all of us entered the house and went upstairs. I continued to hold onto the bottle in his presence until Lieutenant Fraga arrived to take fingerprints off of the bottle.

Q. Did Lieutenant Fraga take the bottle in his

(Testimony of Roy F. Case.)

possession for the purpose of taking fingerprints?

A. No, sir, I held the bottle while he dusted it and tried to lift any possible prints from it.

Q. You never lost possession of the bottle?

A. No, sir; I then, after he had dusted it for fingerprints, I retained it in my possession until I handed it to Mr. Wells, who was standing right there, in the presence of the defendant and all of us.

Q. Where was that?

A. This was in the dining room of 803 Hausten Street, and Mr. Wells—

Q. One second. Did Mr. Wells ever give the bottle [59] back to you after you handed it to him in the dining room?

A. Oh, yes, sir, immediately after. He looked at the bottle and asked Mr. Henry what he estimated that to be. He said about—Mr. Wells said, "This is about 200 grains, don't you think so, Henry?"

And Mr. Henry said, "More than that."

Q. What did Mr. Henry say?

A. "More than that."

So Mr. Wells pulled the bottle stopper out and dipped his finger into the contents of it and rubbed it on his tongue.

Q. Was Mr. Henry there at that time?

A. Yes, sir.

Q. Did he say anything? A. Yes, sir.

Q. What did he say?

A. He said, "Man, that is dynamite. Billy, you

(Testimony of Roy F. Case.)

know better than that." So Mr. Wells remarked that his tongue felt a little numb and he——

Q. Go ahead.

A. He replaced the stopper and gave it to me and told me to keep possession of it until it was properly turned over to him.

Q. When did you turn the bottle over to Mr. Wells, if you did?

A. Immediately—as soon as we reached the vice division [60] of the Honolulu Police Station, I sealed the bottle and initialed it and turned it over to Mr. Wells in Captain Whitford's office.

Q. Did anybody else initial the bottle in your presence? A. Yes, sir.

Q. Who?

A. Officer Shaffer, Mr. Wells, Sergeant Sousa, Sergeant Kinney, Officer Sasaki, Richard Sasaki, and there may have been others.

Q. Except for those initials, from the time you found the bottle on this sun couch until the time that you gave it to Mr. Wells down at the vice squad office, was there any change in the condition of the bottle and the condition of its contents?

A. No change in the condition of the contents, and the only conditional change of the bottle was that I sealed it with yellow supplementary paper and scotch tape.

Q. And where did you do that?

A. In the vice division room.

Q. Were there any pictures taken of this sun couch where you found the bottle?

(Testimony of Roy F. Case.)

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A. No, sir, I held the bottle while he dusted it and tried to lift any possible prints from it.

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Q. Was Mr. Henry there at that time?

A. Yes, sir.

Q. Did he say anything? A. Yes, sir.

Q. What did he say?

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(Testimony of Roy F. Case.)

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Q. Go ahead.

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A. Officer Shaffer, Mr. Wells, Sergeant Sousa, Sergeant Kinney, Officer Sasaki, Richard Sasaki, and there may have been others.

Q. Except for those initials, from the time you found the bottle on this sun couch until the time that you gave it to Mr. Wells down at the vice squad office, was there any change in the condition of the bottle and the condition of its contents?

A. No change in the condition of the contents, and the only conditional change of the bottle was that I sealed it with yellow supplementary paper and scotch tape.

Q. And where did you do that?

A. In the vice division room.

Q. Were there any pictures taken of this sun couch where you found the bottle?

(Testimony of Roy F. Case.)

A. Yes, sir. Lieutenant Fraga took pictures of the head rest where the indentation of the bottle against the pillow had been pressed—where the bottle had been pressed into the pillow, leaving an indentation. He took that of the [61] sun couch.

Q. And how long was that picture taken after you found the bottle?

A. Shortly afterwards, within a few minutes.

Q. Were there any severe changes in the atmospheric conditions from the time you found the bottle until the time those pictures were taken?

A. No, sir.

Mr. Hoddick: May I have these marked for identification purposes.

The Court: Two pictures?

Mr. Hoddick: Yes, your Honor.

The Court: They may be marked for identification as—

The Clerk: United States Exhibits Nos. 3 and 4.

(Thereupon, the documents above-referred to were marked United States Exhibits Nos. 3 and 4, for identification.)

Q. (By Mr. Hoddick): Showing you United States Exhibit No. 4, Mr. Case, I ask you if this is an accurate picture and portrayal of the sun couch where you found the bottle?

A. Yes, sir, this is the upper half, the back and head rest.

Q. And in what position is the head rest in that picture?

(Testimony of Roy F. Case.)

A. The head rest is facing mauka. The pillow is up.

Q. Showing you United States Exhibit No. 3, for identification [62] purposes, I ask you if this is an accurate picture and portrayal of the entirety of the sun couch. A. Yes, sir, that is.

Q. And in what position is the head rest in that picture? A. Down.

Mr. Hoddick: I would like to offer these in evidence, your Honor.

Mr. Landau: No objection.

The Court: They may become—

The Clerk: No. 3 as United States Exhibit B, and No. 4 as United States Exhibit C.

(Thereupon, the documents heretofore marked United States Exhibits Nos. 3 and 4 for identification were received in evidence as United States Exhibits B and C, respectively.)

Q. (By Mr. Hoddick): When did you place your initials on the bottle which you found, Mr. Case?

A. I don't recall the exact time, sir, but it was when we reached the police vice room, approximately four o'clock.

Q. After you got to the police station?

A. Yes.

Mr. Hoddick: I should like to have marked for identification purposes a small bottle.

The Court: It may be marked for identification.

(Testimony of Roy F. Case.)

The Clerk: United States Exhibit No. 5, for identification. [63]

(Thereupon, the article above-referred to was marked United States Exhibit No. 5, for identification.)

Q. (By Mr. Hoddick): Mr. Case, showing you United States No. 5, for identification purposes, I ask you if you can identify it.

A. Yes, sir, that is the bottle.

The Court: What?

The Witness: Yes, sir, this is the bottle. It has my initials, my writing, and sealed as I sealed it.

Q. (By Mr. Hoddick): This is what bottle?

A. The bottle I found at 803 Hausten Street.

Q. On the sun couch?

A. On the sun couch.

Q. And can you find your initials thereon?

A. Yes, sir, at the top.

Q. Was this paper around the bottle at the time you found it?

A. No, sir, I placed that paper around there myself.

Q. Was there any paper on the bottle at the time you found it?

A. There was no paper with the exception of a little bit that was plugged in with the cork.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

(Testimony of Roy F. Case.)

Cross-Examination

By Mr. Landau: [64]

Q. In other words, immediately upon receiving the radio call, you went to 803 Hausten Street from Kalakaua?

The Court: Radio call?

Q. (By Mr. Landau): You received a radio call, didn't you?

A. No, sir, I received a telephone call.

Q. Was it a telephone or radio telephone?

A. Telephone.

Q. And you immediately left to go to Hausten Street?

A. Not immediately; within five or ten minutes.

Q. And then you walked into the premises, the yard, and walked around to the back and side; is that correct? A. Yes, sir.

Q. And just as you got there, Sasaki was lifting up the cement flagstone?

A. That is correct, sir.

The Court: Speak louder.

The Witness: Yes, sir, that is correct.

Q. (By Mr. Landau): Did he see you at that time or did you see him?

A. Well, I saw him first; then as he raised up the stone, why then he saw me.

Q. Then he saw you. Well, then, he didn't have to do anything to call your attention to the fact that he had found this bottle there, did he, Mr. Case?

A. Well, he didn't have to, no.

(Testimony of Roy F. Case.)

ing and know what transpired while he was gone. But that portion was not in that section.

The Court: Well, if you are proposing to quote what a witness this morning said, we will have to call for the transcript.

Mr. Landau: I will withdraw the question until such time as the reporter is available, if the Court please.

Q. (By Mr. Landau): Well, at any rate, you saw the bottle under there and you called Mr. Wells; is that correct? A. Yes, sir.

Q. Now, where was the flagstone at that time, Mr. Case? Was it over the hole or had it been removed?

A. When I first seen it, it was being held in an upright position by Officer Sasaki.

Q. Now, when did you put your initials on that bottle? Exhibit 2, for identification, I think, isn't it? I am talking about the big bottle.

A. I put my initials on that bottle at 803 Hausten Street.

The Court: That is Exhibit 1, for identification.

Mr. Landau: I am sorry. [68]

Q. (By Mr. Landau): When?

A. At about 1 p.m. in the afternoon, or a little later.

Q. About 1 p.m.?

The Court: What was that? What did the witness say?

(Answer read.)

(Testimony of Roy F. Case.)

Q. (By Mr. Landau): Not that the times are going to be very material, but let me call your attention to the fact that you testified that you got there about 1:08 p.m. I don't want you to be taken by surprise.

A. Well, I got there at about 1:08 p.m. I don't recall exactly, but it was shortly after the bottle was found.

Q. Was it before you continued to search or after you continued to search that you put your initials on that bottle?

A. It was after—it was after I had found my bottle.

The Court: What time of the day was this, morning, noon, night?

The Witness: In the afternoon, sir.

Q. Well, now, this area where the—what would you describe this as, a couch or chaise lounge?

A. I would describe it as a sun couch.

Q. OK, let's call it a sun couch. This area in which this sun couch was found was close to the area where the Ovaltine bottle was found; isn't that correct? [69] A. Yes, sir.

Q. And, as a matter of fact, looking at Government's Exhibit No. 3 for identification, it shows a picture of the flagstone, does it not, the one that was lifted off the ground?

A. I am not sure if that is the flagstone.

Q. Well, now, take a look at the picture that is in evidence, which is Exhibit A, and I ask you

(Testimony of Roy F. Case.)

whether or not you see a hollow tile wall there next to the flagstone? A. Yes, I do.

Q. And at the bottom of the tile wall there is a rough base of some kind? A. Yes, I see that.

The Court: What?

Mr. Landau: Base.

The Court: I know, but I have got to hear him.

The Witness: Yes, I see that.

Q. (By Mr. Landau): And now looking at United States Exhibit 3 for identification, I ask you if you see a tile wall in that picture.

A. Yes.

Q. Do you see a rough base on that picture?

A. Yes.

Q. And do you see a flagstone which looks as though it is the same flagstone as in the picture in evidence? [70] A. It appears to be, yes.

Q. You were there, Mr. Case; I was not. As a matter of fact, from your memory of it, it is the same flagstone, the same area, isn't it?

A. It may be, but I am not sure.

Q. Well, let's put it this way. How far from the flagstone where the Ovaltine bottle was found was this sun couch? A. Oh, about 15 feet.

Q. About 15 feet. In other words, you walked away from the area where the flagstone was and walked on a paved patio? A. Yes.

Q. And just around the paved patio was the sun couch? A. Yes.

Q. And this is the picture, Exhibit B-3 for identification—

(Testimony of Roy F. Case.)

The Clerk: It is in evidence.

Mr. Landau: I am sorry.

The Clerk: They are both in evidence.

Q. (By Mr. Landau): Exhibit B in evidence, isn't that the description you have just given the Court and jury? A. Yes.

Q. About 15 feet from the flagstone. As soon as you got off the area where the flagstone was, you stepped on a paved porch patio? [71]

A. Yes.

Q. And just around the corner was a couch?

A. Yes.

Q. So that is a picture showing the flagstone, the patio, and the couch; isn't that correct?

A. This appears to be the flagstone. I am not sure that it is.

Q. Let's put it this way: The flagstone that was lifted to make visible this bottle of Ovaltine was in the area to the right of the picture; is that correct? Right in here (indicating)?

The Court: Exhibit—

A. It was located in that area, yes.

The Court: The picture is Exhibit B?

Mr. Landau: Exhibit B, yes, your Honor. I would like to have the Jury look at this picture so they can understand what we are talking about, too.

(Handed to jury.)

Q. (By Mr. Landau): In other words, as you came away from the area where the flagstone had been lifted from the ground to make visible this

(Testimony of Roy F. Case.)

bottle of Ovaltine, the first bit of furniture that came into your view was this couch? A. Yes.

Q. And so you lifted up the pillow; is that correct? A. No.

Q. What did you do? [72]

A. I searched along the stone wall there in the hollow tile portion from the top down until—there were some flower boxes there. I looked along that portion where the flower boxes were. On the makai side there were some bricks. I looked along there. I searched over by a barbecue pit in the far mauka Koko Head corner of the lot.

Q. Didn't Sasaki tell you that he had already searched there and there was nothing there?

A. He didn't say anything to me.

Q. He didn't say anything to you?

A. In reference to that.

Q. You didn't say anything on direct examination about the various places that you had searched. Was that something you overlooked, Mr. Case?

A. I didn't say anything about it. I hadn't overlooked it.

Q. What is that?

A. I said I didn't say anything about it.

Q. I say, you overlooked that in your direct examination.

A. I didn't mention it; that is all.

Q. But you eventually got to the couch, didn't you? A. Yes, sir.

Q. When you got to the couch, you lifted up the

(Testimony of Roy F. Case.)

pillow, is that right? [73] A. That's right.

Q. Now, at the time you lifted the pillow, let me ask you this question: Were you in the back of the head of the couch, or on the side of it?

A. I was in back of it.

Q. I see. In other words, you walked over, there is the couch lying down in this general area, you run back and you lift up the pillow; is that correct?

A. Yes, sir.

Q. And as you lifted up the pillow, the bottle dropped? A. Yes, sir.

Q. In other words, the only thing that was holding the bottle in that position was the weight of the pillow?

A. The pillow had been pressed so that the bottle made an indentation. It may have had something to do with holding it there.

Q. How long after you found this bottle was this picture taken? A. Oh, about half an hour.

Q. About a half hour. Do you know what this pillow was made of, what the filling consisted of?

A. I don't know what the filling consisted of.

Q. Was it soft, light fluffy material, or what was it? A. The outer covering was canvas.

Q. What was the inside? [74]

A. I don't know what the inside was.

Q. Was it soft or firm, or what was the consistency? A. It felt rather firm.

Q. It felt rather firm. You saw nothing on the couch, pillow or the couch itself, which would en-

(Testimony of Roy F. Case.)

able a bottle to remain there, like a hook or anything of that kind?

A. No, I didn't see anything like that.

Q. In other words, the only thing that kept the bottle there was the weight of the pillow on it?

A. Possibly, yes.

Q. Well, you saw nothing else that would keep it there, did you?

A. Only that it was pressed there, the pillow was pressed.

Q. Was there any mark on the outside?

A. No, there wasn't.

Q. Did you ever see the couch after the picture was taken? A. Yes.

Q. Was the mark still there? A. Yes.

Q. In other words, the mark never disappeared?

A. Not while I was there that I know of.

Q. Now, do you know whether Mr. Wells gave you the same instruction with reference to the handling of the bottle [75] that he gave Mr. Sasaki?

A. I don't know if it was exactly the same instructions, but Officer Sasaki and I, upon recovering the two bottles, we were together in the presence of the defendant per instructions of Mr. Wells.

Q. You mean after you found the—

Mr. Landau: Strike that.

Q. (By Mr. Landau): After Sasaki found the bottle, he was never out of the presence of the defendant?

A. I couldn't say that because I was still search-

(Testimony of Roy F. Case.)

ing while he was in the presence of the defendant out of my presence. I don't know whether he was in the presence of the defendant or not.

Q. After you found your bottle, were you and Sasaki together all the time?

A. I don't know whether we were together all the time or not, but I was in the presence of the defendant all the time.

Q. Well, then, you were mistaken, when you said previously, in answer to my question, that you and Sasaki were together all the time in the presence of the defendant after you found your bottle?

A. Will you repeat that again, please.

(Question read.)

A. Up until the time that Officer Sasaki was—had [76] counted the capsules, whatever it was in the bottle.

Q. You were together then from the time you found your bottle until the capsules in the Ovaltine bottle were counted; is that correct?

A. That's right.

Q. Then what happened? Did you separate?

A. Well, I don't—we left the address after the capsules were counted and Mr. Wells tasted the contents of the bottle that I had and gave it back to me, then we all went to the police station after that. The search was over.

Q. Do you know whether Lieutenant Fraga actually took any fingerprints off your bottle or Sasaki's bottle?

(Testimony of Roy F. Case.)

A. He took two prints off the bottle that I found, but whether they were substantial prints or not, I don't know.

Q. You have never inquired?

A. I never.

Q. How about the other bottle? Do you know anything about that?

A. I know he dusted it for prints, but whether he got any or not I don't know.

Q. Now, you weren't called to testify by Mr. Hoddick in the preliminary hearing before Judge Steiner, were you, Mr. Case? A. No, sir.

Q. Now you said you gave the bottle to Mr. Wells in the dining room. Was that after the capsules in the Ovaltine bottle had been counted or before then?

A. After, I believe. Just after it was counted.

Q. After that. What happened after you gave it to Mr. Wells, of course, you don't know? I say, what happened to the bottle after you gave it to Mr. Wells you don't know? A. Yes, I know.

Q. Of your own knowledge?

A. Yes, of my own knowledge. You are speaking of at 803 Hausten Street?

Q. Yes, you gave this bottle to Mr. Wells in the dining room? A. Yes, sir.

Q. Did he put it in his pocket?

A. No, sir.

Q. Put it in a bag?

A. I just handed it to him; he was standing right next to me—lifted the top off—

(Testimony of Roy F. Case.)

Q. Just answer my question. Don't be quick to volunteer information. Just answer my question. You gave him the bottle? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Did you thereafter have it in your possession at [78] any time? A. Yes, sir.

Q. All right. Now, when did you have it in your possession after you had given it to him?

A. After I had given it to him, he turned right around and gave it back to me.

Q. He gave it back to you. Did you at any time thereafter give it to Mr. Wells again?

A. Yes.

Q. And when did you give it to him again?

A. In the Honolulu police station, vice room.

Q. At the Honolulu police station. And thereafter, what became of it you do not know?

A. I do not.

Q. Well, that is what I have been trying to get at. Was Mr. Kinney anywhere around there at the time? A. What time is that, sir?

Q. At the time that you found this bottle.

A. Yes, sir, he was in that portion of the wash room there. He stuck his head out of the window at the time I found it.

Q. Was he with you when you found this bottle?

A. No, sir, not right with me.

Q. Did he see the bottle drop from underneath the pillow? [79] A. I don't know.

Q. The reason I asked is because I notice he has his initials on this, too.

Mr. Landau: That is all.

The Court: Redirect?

Mr. Hoddick: No redirect.

The Court: Excused. Next witness.

(Witness excused.)

Mr. Hoddick: Francis Ferry.

The Court: I think we might just as well take our afternoon recess at this time, ten minutes.

(Recess had.)

### FRANCIS C. FERRY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name.

The Witness: Francis C. Ferry.

The Court: Age?

The Witness: Thirty-one.

The Court: Residence?

The Witness: 2878 C Loi Street.

The Court: Honolulu?

The Witness: Honolulu.

The Court: It is very difficult to hear in this court room, and I feel sure you can speak good and loud all [80] of the time, so I won't have to remind you again.

What is your occupation?

The Witness: Police officer.

The Court: Employed by—

The Witness: Honolulu Police Department.

The Court: You are a citizen of the United States?

The Witness: I am.

The Court: Exclusively?

The Witness: I am.

The Court: Take the witness.

### Direct Examination

By Mr. Hoddick:

Q. Mr. Ferry, how long have you been with the Honolulu Police Department?

A. About a year and approximately ten days.

Q. And during July of 1949 with what branch of the Honolulu Police Department were you serving?

A. With the vice division. In the vice division.

Q. Who was in charge of the vice division at that time?

A. Captain Whitford was in charge at that time.

Q. Do you know the defendant Winston Churchill Henry? A. I do.

Q. Did you see him in July of 1949?

A. I did. [81]

Q. Did you see him at 803 Hausten Street?

A. I did.

Q. During July of 1949?

A. I did, yes, sir.

Q. Can you point out the defendant in the court room? A. He is over there (indicating).

Q. How is he dressed?

A. With a maroon coat.

(Testimony of Francis C. Ferry.)

Mr. Hoddick: May the record show that the witness has identified the defendant.

The Court: Yes.

Q. (By Mr. Hoddick): About what time of day did you go to 803 Hausten Street?

A. I went there approximately, oh, I would say about ten to one.

Q. And where had you been before going there?

A. Before going there I was at Smith Street per instructions of Captain Whitford.

The Court: Excuse me. Is this morning or afternoon?

The Witness: This is the afternoon. When I went there on Smith Street was in the morning, and when I went there was in the afternoon, p.m.

Q. (By Mr. Hoddick): And why did you go to 803 Hausten Street? [82]

A. Per instructions of Captain Whitford to assist William Wells in the search for narcotics.

Q. Did anybody go to 803 Hausten Street with you?

A. Officer Harry Pestano was with me at the time when I went there.

Q. And how did you go?

A. He went in my car.

Q. After you arrived at 803 Hausten Street, did you participate in the search? A. I did.

Q. And where did you search?

A. I concentrated my search mostly in the rear of the rear apartment of 803.

(Testimony of Francis C. Ferry.)

Q. Now when you speak of rear apartment, what do you mean?

A. At 803 there is two apartments. There is one apartment in the front and one in the rear. The house that I searched was in the rear of 803. It was a stucco home, I think it was.

Q. Are these apartments separate houses?

A. They are separate houses.

The Court: Excuse me. I am going back. I just got that word. I thought he was giving the name of a family, but I understand from the interpretation by the Clerk that you were saying a "stucco home."

The Witness: A stucco, that is right.

Q. (By Mr. Hoddick): And you searched in the rear of this rear house? A. That is right.

Q. The rear apartment?

A. That was the first place I started to search.

Q. And where did you look back there for narcotics? A. Where did I look?

Q. Yes.

A. Well, when I first got in the back there, I went on the roof of the house, and I found nothing there, so I went down, I came down from the roof.

Q. Did you have any difficulty getting down from the roof?

A. A little. And I seen these canvas weather shelters. It was installed right on the outside of the window to the—I think it was the wash house. And when I looked up, I seen two big—a box and a brown package.

(Testimony of Francis C. Ferry.)

Q. In what direction do those windows face?

A. They face Waikiki of the house.

Q. Go ahead.

A. And Sergeant Kinney, who was in the near vicinity when I found—there was Sergeant Kinney and Captain Whitford, so I called Captain Whitford and I called Kinney and I said, "I think I got something here." So Sergeant Kinney said, "Leave [84] it up there until we call Billy Wells."

Q. Will you describe just where these packages were that you found.

A. It was—the packages—both packages were jammed between the screen and the canvas curtains.

Q. At the top or at the bottom?

A. At the very top, at the very top.

Q. What did you do after Kinney suggested that you call Wells?

A. Officer—I mean Mr. Wells and Mr. Henry there came over to the scene, and Mr. Wells told me to take it down. So I took the, I took the packages down and I handed it over to—I handed one package, the brown paper bag where they had bulk marijuana, or I suspected marijuana.

The Court: That may go out. The jury is instructed to disregard that. You took something down.

The Witness: I took something down.

The Court: Unless you positively know what it was, you are not allowed to testify as to what it was.

(Testimony of Francis C. Ferry.)

The Witness: I see.

The Court: You took a package.

The Witness: I took the two packages. There was a little square box and a brown paper bag.

Q. (By Mr. Hoddick): Mr. Ferry, did you look in the brown paper bag? [85] A. I did.

Q. Can you describe the contents without giving your conclusions as to what the contents were?

A. It looked like tea in one and the other one was rolled cigarettes in brown durham paper—I mean, that is brown wheat paper.

Q. What did you do with this package and this box after you took them down from behind the canvas curtains?

A. We all walked towards the cement patio and I handed the brown paper bag to Mr. Wells, and Mr. Wells examined it. Then he handed me the brown paper bag and I handed him the paper box. And Mr. Wells looked at the box and he counted the rolled contents in this wheat paper, brown wheat paper.

Q. How many of these brown cigarettes were there in that box? A. Twenty-nine.

Q. And then did he return the box to you?

A. He returned the box and he said to hold it.

Q. Was Mr. Henry present at the time you took down the box and the paper bag? A. He was.

Q. Was he there at the time the cigarettes were counted? A. Yes, sir.

Q. Did he say anything at that time?

(Testimony of Francis C. Ferry.)

A. No, sir. [86]

Q. What did you do with the box and the paper bag after it was returned to you by Mr. Wells?

A. Mr. Wells told me to carry it into the—whatever would you call that—something like a dining room like right next to the kitchen. It was the same room, and there was a big table there where we had everything, and I handed it over to Lieutenant Fraga for any fingerprints.

Q. Did he test this paper bag and the box in your presence? A. He did.

Q. And were you there all the time he made the test? A. I was.

Q. Did he return them to you?

A. He returned it back to me.

Q. What did you do?

A. Then I turned it over to—I signed it. Mr. Wells told me to initial it and put the date and time on it. I handed it over to Mr. Wells.

Q. When you say "it," are you referring to both packages? A. Yes, sir, I am.

Q. Did you put your initials on both packages?

A. I did.

Mr. Hoddick: May I have a paper box which has the name "New Drene Shampoo" printed on it marked for identification [87] purposes.

The Court: Yes.

The Clerk: United States Exhibit No. 6.

The Court: For identification.

The Clerk: For identification.

(Testimony of Francis C. Ferry.)

(Thereupon the article above-referred to was marked United States Exhibit No. 6, for identification.)

Mr. Hoddick: May I also have marked for identification purposes a brown paper bag with a rubber band around it.

The Court: Yes.

The Clerk: United States Exhibit 7 for identification.

(Thereupon the article above-referred to was marked United States Exhibit No. 7, for identification.)

Q. (By Mr. Hoddick): Mr. Ferry, showing you United States Exhibit No. 6 for identification purposes, I ask you if you can identify that box.

A. I can.

Q. And what is it?

A. That is the same box that I found under the eaves.

Q. Now how can you tell?

A. Well, I remember the box and I have my initials on the box.

Q. Can you find your initials there?

A. Yes, I can. It is right here, "FCF." [88]

Q. Would you look at the contents of that box and tell me whether those contents appear to you the same as when you found it? A. Yes, it is.

Q. I hand you United States Exhibit No. 7 for identification purposes and ask you if you can identify that exhibit? A. I can.

(Testimony of Francis C. Ferry.)

Q. Will you please identify it?

A. Right here (indicating), "FCF." I put my initials on the package.

Q. Now what is that exhibit—now wait. Is that the exhibit that you found between the curtain and the screen? A. That's right, it is.

Q. At 803 Hausten Street?

A. That's right, it is.

Q. From the time that you found United States Exhibit No. 6 for identification purposes and United States Exhibit No. 7 for identification purposes until the time that you turned them over—

Mr. Hoddick: I will withdraw that question.

Q. (By Mr. Hoddick): After you had initialed it, what did you do with those two exhibits?

A. I turned it over to Mr. Wells.

Q. And where did you do that?

A. I did that in the dining room in this, well, it is—[89] I don't know whether you call it a dining room or not. It is in the same, it is just in the rear of the kitchen. I think it is a dining room, you would call that a dining room, the rear room of the kitchen.

Q. Was Mr. Henry present at that time?

A. He was.

Q. From the time that you found United States Exhibit No. 6 for identification purposes and United States Exhibit No. 7 for identification purposes until the time that you turned them over to Mr. Wells, was there any change in their condition or in

(Testimony of Francis C. Ferry.)

the condition of their contents? A. No, sir.

Q. Did you continue searching the premises?

A. I did.

Q. Was anything further found in your presence?

A. Yes, as soon as I turned the marijuana over—Excuse me—the two contents over to Mr. Wells, I immediately proceeded in the parlor, and there was a large buffet.

The Court: All right, stop there. The reference to marijuana is stricken and the jury is instructed to disregard it. You corrected yourself, but nevertheless I have to strike it out clearly. All right.

The Witness: Then I assisted Officer Shaffer and Harry Pestano, who were lifting the cushions of the buffet—I mean sofa, rather. I think it was a sofa or something, and [90] we lifted up the cushions, and Harry Pestano discovered some more cigarettes rolled up in loose paper, durham paper, I guess it is, white paper.

Q. (By Mr. Hoddick): What color was the paper?

A. I think it was brown, or white. I am not too sure now.

Q. And do you remember how many were found under that cushion? A. I think it was six.

Q. Did you place any identifying marks on those six cigarettes? A. I did.

Q. What were the marks that you put on them? A. "FCF."

(Testimony of Francis C. Ferry.)

Q. Now, during the time that you were at 803 Hausten Street, Mr. Ferry, did you hear the defendant say anything?

A. Well, when I went back in to bring the two contents over to Lieutenant Fraga, Mr. Wells was at that time testing the white powdered substance in the bottle that was discovered by Mr. Case, and if I remember correctly, the defendant, when Mr. Wells tasted some of it and rubbed it on his tongue, Mr. Henry said something, "You know better than that. That's dynamite," or something, words to that extent.

Q. Did you hear him say anything else during the course of the search? [91]

A. Mr. Wells said, "There is about 200 grains of something in there," and Mr. Henry said, "More than that," or something like that.

Q. Did you hear the defendant say anything to anyone other than Mr. Wells?

A. I don't know. I don't believe I can remember that.

Q. Did you hear the defendant say anything to a Mrs. Thomas who was there?

A. Oh, yes, he said something like, "You don't have to answer any questions," or something like that. Or, "Don't answer them," or something like that, in that extent. So Mr. Wells said, "Well, I can ask her her age, can't I?" To that extent.

Q. Did you see what Mr. Pestano did with the six cigarettes that were found under the couch pillow inside the house?

(Testimony of Francis C. Ferry.)

A. Well, when he gathered the six, I immediately assisted Sergeant Sousa in searching about three drawers that were built in the—I think it was built in the house, into the wall, if I am not mistaken.

Q. Mr. Ferry, I asked you if you saw what Mr. Pestano did with the six cigarettes that you found under the pillow on the couch.

A. No, I didn't.

Q. You did not. [92]

Mr. Hoddick: No further questions.

The Court: Cross-examination.

#### Cross-Examination

By Mr. Landau:

Q. Was Mr. Henry handcuffed to Mr. Wells all this time, Mr. Ferry? A. No, sir, he was not.

Q. You knew he was under arrest?

A. I knew he was under arrest.

Q. And therefore he was obliged to go along with Mr. Wells wherever Mr. Wells went.

A. That's right.

Q. Isn't that correct? A. Yes.

Q. And that is the reason he was with Mr. Wells whenever Mr. Wells went where somebody called him? A. That's right.

Q. You are another witness that was kept on the rack by Mr. Hoddick and didn't testify down before the Commissioner; isn't that correct?

Mr. Hoddick: Objection, your Honor. It is not

(Testimony of Francis C. Ferry.)

proper cross-examination and it is entirely immaterial.

The Court: It is argumentative. Sustained.

Q. (By Mr. Landau): Well, as a matter of fact, you didn't testify before the United States Commissioner? [93]

Mr. Hoddick: Objection on the same grounds.

The Court: Did not testify?

Mr. Landau: He did not testify.

The Court: Overruled.

Q. (By Mr. Landau): Is that correct? In this particular case.

A. I am trying to recall now. I don't recall.

The Court: Speak up loud so I can hear you.

Q. (By Mr. Landau): As a matter of fact, you as a police officer know that a person who is under arrest doesn't have to answer any questions; isn't that correct, Mr. Ferry? A. That's right.

Q. And at that time Miss Thomas was under arrest, wasn't she?

A. No, she was not, sir, not as far as I was concerned.

Q. Well, it is not a question of whether you were concerned. Do you know whether she was under arrest? A. She was not under arrest.

Q. You are sure of that?

A. I am sure, positive.

Q. But Henry was?

A. Henry was under arrest.

(Testimony of Francis C. Ferry.)

Q. Now, Miss Thomas was brought down to the police station, wasn't she?

A. I think she was. [94]

Q. And, as a matter of fact, she was brought to the vice room and examined, questioned?

A. You see, at this time here, I drove the other minor children to the home of—I mean to the home of Bernice Black, I think it is, and I didn't go to the station until some time after.

Q. Did you see Helen Thomas there when you got there?

A. I may have seen her when I got there.

Q. And wasn't Miss Thomas also charged with an offense at that time, Mr. Ferry?

A. If she was, I didn't know nothing about it.

Q. Did you ever find out that she was at that time charged with an offense?

A. No, sir, I didn't.

Q. Well, don't you know that she was charged with this offense? A. I don't.

Q. With the possession of these alleged narcotics? A. I don't.

The Court: What narcotics?

Mr. Landau: I didn't hear the Court.

The Court: You said: Do you know whether or not Miss Thomas was charged with the offense of possessing these narcotics? What narcotics?

Mr. Landau: I said "alleged narcotics." [95]

The Court: Are you sure?

Mr. Landau: What?

(Testimony of Francis C. Ferry.)

The Court: In any event, there is no evidence that we have any narcotics here.

Mr. Landau: No, I mean alleged narcotics. It is alleged in the indictment, if the Court pleases.

Q. (By Mr. Landau): You had no information, of course, that there was anything hidden between the screen and the canvas weather shutters?

A. No, I didn't have any intimation.

Q. And you were just making a cursory look around; isn't that right?

A. That's right. I was just looking around the premises in the systematic search that we—

Q. I take it from your description you looked around and there they were.

A. No, sir, I don't know what made me look under there, but anyway I lifted up the curtains and I looked upwards, because I was looking at every nook and corner before that anyway.

Q. Well, anyway, merely by lifting the canvas shelter away, you looked up and there it was.

A. That's right, plain in view.

The Court: I can't determine whether this is inside a building or outside a building. [96]

The Witness: No, sir, this is the outside of the building in the rear of the house.

Mr. Landau: He testified it was an outside weather canvas shelter.

The Court: Was it an awning?

The Witness: It was sort of like a weather awning, only it went straight down instead of braced up.

(Testimony of Francis C. Ferry.)

The Court: Sort of like a shade?

The Witness: Sort of like a shade.

Q. (By Mr. Landau): Except it was on the outside of a screen instead of on the inside?

A. That's right.

Q. Do you know whether some of the officers who had got there earlier than you, had walked through the same area that you had walked through?

A. Perhaps. I wouldn't deny that. Perhaps they did, because I have no knowledge of that.

Q. As a matter of fact, when you got there, the search was under way, vigorously, by everybody, wasn't it? A. That's right.

Q. And also, as a matter of fact, as soon as you got to the premises, you started to search without getting any instructions from anybody?

A. No, sir, I reported straight to Lieutenant—I mean Captain Whitford and Mr. Wells. [97]

Q. Then were you left on your own devices, or did they direct you where to go?

A. I think Sergeant Kinney directed me to concentrate my search in the rear of the building.

Q. And Sergeant Kinney was one of the two officers who happened to be near by you when you saw those two packages?

A. That is right, very correct.

Q. Now were you there when the other officers, Case and Sasaki, yielded possession of these bottles to Mr. Wells?

A. I was there when—I think I was there just

(Testimony of Francis C. Ferry.)

a little after they had turned over the bottles to him.

Q. Did they, in your presence, ever get those bottles back, or did they remain in Mr. Wells possession?

A. I wouldn't—I wouldn't know. I don't think it was done in front of my presence, because as soon as my work was finished, I mean, my duty was finished, I went right away out to assist Officer Pestano and Shaffer.

Q. Do you know whether Lieutenant Fraga lifted any fingerprints from these two articles that you found? A. I don't believe he did.

Q. You saw him dusting it?

A. That's right, I did.

Q. Did the buffet that you mentioned and then forgot about have anything to do with the search in the dining room or the living room? [98]

A. Did it have anything to do with it?

Q. You mentioned something about lifting a buffet.

A. Not a buffet. I meant to say sort of a couch like.

Q. Couch?

A. Yes, large pillows, about three pillows in a couch.

Q. And I take it Pestano was just pushing the pillows away and there were these articles which you have described.

A. No, sir, we were lifting it up. I lifted one big pillow, one big cushion, rather, and Pestano

(Testimony of Francis C. Ferry.)

lifted the other cushion. We just lifted it up like that.

Q. These were fitted cushions? A. Yes.

Q. Not scatter cushions?

A. No, fitted cushions.

Q. What kind of a frame was it, do you know? Was it a rattan frame, do you know?

A. No, it was not a rattan frame. I think it was the other type.

Q. But it was easy enough to pull the pillows up?

A. Very easy, yes, sir.

Q. And when you pulled the pillows up, there were these articles which you have described?

A. That's right.

Mr. Landau: I think that is all.

The Court: Redirect. [99]

#### Redirect Examination

By Mr Hoddick:

Q. Mr. Ferry, did you see Miss Thomas, or Mrs. Thomas, when you first arrived at the premises?

A. I did.

Q. Was she with you when you went outside and continued the search?

A. No, sir, she was not.

Q. Were there some periods of time while you were there during which Mrs. Thomas was out of your sight? A. Yes, sir.

Q. Is it possible that during those periods Mrs. Thomas might have been arrested?

(Testimony of Francis C. Ferry.)

A. It is possible. I have no knowledge of it, though.

Mr. Hoddick: No further questions.

Mr. Landau: No further questions.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Hoddick: Officer Harry Pestano.

### HARRY L. PESTANO

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: What is your name?

The Witness: Harry L. Pestano. [100]

The Court: How old are you?

The Witness: Twenty-six.

The Court: Do you live in Honolulu?

The Witness: Yes, sir.

The Court: By whom are you employed?

The Witness: Honolulu Police Department.

The Court: Are you a citizen of the United States?

The Witness: Yes, sir.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

(Testimony of Harry L. Pestano.)

Direct Examination

By Mr. Hoddick:

Q. Mr. Pestano, how long have you been with the Honolulu Police Department?

A. Two years.

Q. And during July of 1949 with what branch of the Police Department were you serving?

A. I was in the vice division.

Q. Who was in charge of the vice division at that time? A. Captain Whitford.

Q. Do you know the defendant, Winston Churchill Henry?

A. Yes, sitting over there. Far end of the table.

Q. Far end of the table. Will you describe the color of the jacket he has on? [101]

A. Maroon.

Mr. Hoddick: May the record show that Officer Pestano has identified the defendant, please.

The Court: Yes.

Q. (By Mr. Hoddick): Did you have occasion to go to 803 Hausten Street on July 16, 1949?

A. Yes, sir.

Q. Did you see the defendant there at that time?

A. Yes, I did.

Q. Where had you been prior to going to 803 Hausten Street?

A. I was on Smith Street.

Q. Were you with somebody on Smith Street?

A. Yes, Officer Ferry and myself.

(Testimony of Harry L. Pestano.)

Q. And why did you go to 803 Hausten Street?

A. Per orders of Captain Whitford we were to patrol Smith Street to see the whereabouts of the defendant.

Q. I said, Why did you go to 803 Hausten Street?

A. Hausten Street. To assist in the raid that was planned by Agent Wells and Captain Whitford.

Q. To assist whom? A. Agent Wells.

Q. About what time did you get to 803 Hausten Street? A. About 12:50 or 12:55 p.m.

Q. And did you assist in the search of the premises? [102] A. Yes, I did.

Q. Would you describe the premises at 803 Hausten Street?

A. 803, the place we searched, was located in the back portion of that particular address. There is another house in the front. It is an up and down—two-story building.

Q. Is there anything that separates the front house from the rear house?

A. A bridge, call it a river, stream.

Q. Did you start to search the premises when you arrived there?

A. As soon as I arrived, we waited for orders as what we should do, orders from Captain Whitford and Agent Wells, we were to search the premises for narcotics.

Q. Where did you search?

A. I searched on the grounds.

(Testimony of Harry L. Pestano.)

Q. Pardon?

A. I searched on the grounds in the immediate vicinity of the place, and in the house as well.

Q. What part of the interior of the house did you search?

A. I searched the living room and the couch.

Q. And in searching the living room, did you find anything unusual?

A. Yes, I found, after lifting up the cushion from the couch, I found—— [103]

Q. Just one second. Don't say anything as to what you thought it was you found.

A. I found six suspected marijuana cigarettes.

The Court: That may go out. The jury is instructed to disregard it.

Now, if you have any more witnesses, I want you to tell them before they get in here. I don't want this to happen again.

Mr. Hoddick: Yes, your Honor.

The Court: You can only testify as to what you know positively of your own knowledge. Until you are qualified to state as an expert what the contents of these things were, we cannot accept your expression of opinion that it was marijuana that these cigarettes that you found contained. Therefore, that statement by you as to what the cigarettes contained is tricken and the jury is instructed to disregard it completely and entirely. All right, let's go back and start over again.

Q. (By Mr. Hoddick): Where did you search

(Testimony of Harry L. Pestano.)

in the interior of the house? A. Living room.

Q. And did you find anything unusual in your search of the living room? Just answer that "yes" or "no." A. Yes.

Q. Will you describe the physical appearance of what [104] you found.

A. I found—well, it is like cigarettes where they roll it in durham paper, brown paper.

Q. And where did you find these things which looked like cigarettes?

A. Underneath the cushion of the couch.

Q. And how many did you find? A. Six.

Mr. Hoddick: May I have marked for identification purposes a United States Treasury Department Envelope?

The Court: Yes.

Mr. Hoddick: And a small package wrapped in cellophane?

The Clerk: United States Exhibit No. 8 and United States Exhibit No. 9, for identification.

The Court: Very well.

(Thereupon, the documents above referred to were marked U. S. Exhibit No. 8 and U. S. Exhibit No. 9, for identification.)

Q. (By Mr. Hoddick): What did you do with these six cigarettes that you found under the cushion on the couch?

A. At first I didn't touch it. We were instructed to notify Agent Wells as soon as we picked up anything that we suspect to be the cause of the raid,

(Testimony of Harry L. Pestano.)

and as soon as I saw what seems to be cigarettes, I called Agent Wells to the scene, in which he in turn called the defendant. [105]

Q. Before the cigarettes were picked up, were both Mr. Wells and Mr. Henry on the scene?

A. Yes.

Q. And what did you do with these cigarettes?

A. Per orders from Agent Wells, told me to pick it up, I did; I picked it up and I took off the cellophane wrapper from my cigarettes and put all six of them in.

Q. And then what did you do with them?

A. I held it until we got back to the vice room. At the vice room I myself put my initial on it.

Q. Did anybody else put his initials on the cigarettes in your presence? A. Yes, sir.

Q. Where did you put your initials?

A. On the cigarette.

Q. Not on the cellophane?

A. Not on the cellophane.

Q. Who else initialed it?

A. Paul Shaffer and Officer Ferry, I believe.

Q. What did you do with the cigarettes after they had been initialed?

A. Turned it over to Agent Wells.

Mr. Landau: I didn't get the answer.

The Witness: I turned it over to Agent Wells.

Q. (By Mr. Hoddick): From the time that you found these [106] six cigarettes under the sofa cushion until the time you gave them to Mr. Wells

(Testimony of Harry L. Pestano.)

down at the vice squad office, was there any change in the condition of those cigarettes?

A. Not to my knowledge.

Q. They were in your possession that entire time, were they not? A. Yes, sir, yes, they were.

Q. Did anybody else have any access to them?

A. No, sir.

Q. Did you change the condition of those cigarettes from the time you found them until the time you gave them to Mr. Wells?

A. No, sir.

Q. I ask you to open carefully U. S. Exhibit No. 8 for identification purposes along this edge. Tear it off from the end, examine the contents, and tell me if you can identify it. A. Yes, sir.

Q. What are they?

A. That is the same things I picked up under the cushion.

Q. How many are there? A. Three.

Q. Now, I would like you to put those back in that envelope. Do your initials appear on those three?

A. Yes, sir (returning to envelope). [107]

Q. Unwrap U. S. Exhibit No. 9 for identification purposes and tell me whether you can identify the contents.

A. Yes, these are the same six, together with these.

Q. These are also three of the cigarettes you found under the cushion on the couch at 803 Hausten Street? A. Yes, sir.

(Testimony of Harry L. Pestano.)

The Court: Under the couch?

Mr. Hoddick: Under the cushion on the couch.

The Court: Which is it?

The Witness: Under the cushion.

Q. (By Mr. Hoddick): Do your initials also appear on those last three cigarettes?

A. My initials appear on all of them.

Q. During the time that you were in the presence of Mr. Henry, the defendant, while the search was being conducted and thereafter, did the defendant say anything?

A. All I heard him say was, he was talking to the woman Helen Thomas, not to say anything. That is all.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

#### Cross-Examination

By Mr. Soares:

Q. Pestano, when did you first know you were going to have a part in this raid?

A. It was the day before the raid took place.

Q. And did you receive specific instructions at that time? A. Yes, I did.

Q. From whom did you receive instructions?

A. Captain Whitford.

Q. Was anyone else present?

A. Yes, Agent Wells.

Q. Did he have any part in giving instructions?

A. No, not to me.

(Testimony of Harry L. Pestano.)

Q. Well, did he talk to Whitford and then Whitford talk to you?

A. I can't say if he did talk to Whitford, but Captain Whitford did talk to me.

Q. While you were receiving your instructions from Captain Whitford in the presence of Wells, Wells never opened his mouth?

A. Not in front of me, no, sir.

Q. And you say that was the day before the actual raid? A. Yes.

Q. On that day that you refer to, did you know the raid was going to take place the next day?

A. No, I didn't.

Q. The time for the raid had not been fixed then? A. No, sir.

Q. You did receive instructions but not any instructions [109] as to when the raid was to take place? A. That's right.

Q. When did you first know when the raid was to take place? A. The day before the raid.

Q. With relation to the time you received these instructions, when did you know the raid was to take place the next day?

A. I beg your pardon?

Mr. Soares: Read the question.

(Question read.)

A. When I was instructed the day before. That is all.

Q. I thought you said you were not told the day before when the raid was to take place.

(Testimony of Harry L. Pestano.)

A. I was told by Captain Whitford the day before the raid took place as to instructions as to a raid to be carried out.

Q. But were you told the raid was going to be held the next day? A. No, sir.

Q. Now, I want to know when you first learned that the raid was going to be held on the day it was held. A. About six o'clock that morning.

Q. The morning of that day?

A. Yes, sir. [110]

Q. And from whom did you hear that?

A. From Captain Whitford and Sergeant Sousa and Sergeant Sasaki.

Q. Was Mr. Wells present?

A. At six o'clock, no.

Q. And what was the first thing you were expected to do in connection with this raid?

A. Myself, Officer Paul Shaffer, Officer Ferry, and Officer Marcotte were to be stationed at the Drier Manor.

Q. Did I understand you to say something in your direct examination about Smith Street?

A. Yes.

Q. Did you receive some instructions with reference to that? A. Yes, sir.

Q. Well, when did you go to Smith Street? Before you went to Drier Manor or after?

A. After.

Q. And what was your purpose in going to Smith Street?

(Testimony of Harry L. Pestano.)

A. To locate the whereabouts of the defendant.

Q. He has a place of business on Smith Street, I think. A. I believe so.

Q. A restaurant? A. I believe so. [111]

Q. You knew where that was?

A. Yes, I did.

Q. Who told you to go there and locate the defendant? A. Captain Whitford.

Q. Was anybody else to accompany you?

A. Officer Ferry.

Q. So far as you know, while you were at Drier Manor the whereabouts of the defendant were unknown? A. Yes, sir.

Q. Is that right? A. Unknown to me.

Q. What is that?

A. He whereabouts were unknown to me.

Q. And did the others also indicate that they didn't know where he was?

A. Officer Ferry didn't. He and I was the only ones that didn't know.

Q. And you and Ferry were told to go to Smith Street and locate the defendant? A. Yes, sir.

Q. And did you receive instructions what you were to do if you did locate the defendant on Smith Street?

A. I did not receive instructions as to what to do. Officer Ferry did.

Q. Well, did you hear the instructions given?

A. No, sir.

Q. So you didn't know what you were supposed

(Testimony of Harry L. Pestano.)

to do after you got to Smith Street and located the defendant; is that right?

A. Locate his whereabouts, yes, sir.

Q. You didn't know what you were supposed to do after having found out where he was?

A. I was told if I was—

Mr. Hoddick: Just a second. That would be hearsay on the part of this witness. Object to the question.

Mr. Soares: You mean you don't want us to go into his instructions with reference to this raid?

Mr. Hoddick: I think it is immaterial and going pretty far afield.

The Court: The objection is based on hearsay. Is there any hearsay?

Mr. Hoddick: Excuse me. I misunderstood the question.

The Court: You may answer the question.

Q. (By Mr. Soares): Is that correct?

A. I beg your pardon? May I hear the question again?

(Question read.)

A. I did.

Q. Well, what were you supposed to do after you found where the defendant was on Smith Street? [113]

A. I was to let Officer Ferry know.

Q. And who found the defendant on Smith Street, you or Ferry? A. Nobody did.

(Testimony of Harry L. Pestano.)

Q. He was not there?

A. He was not there.

Q. Where did you look for him?

A. Smith Street.

Q. And where on Smith Street?

A. Between Pauahi Street and Beretania Street.

Q. Did you go into his place of business?

A. No.

Q. You knew where his place of business was?

A. Yes.

Q. You had been sent to locate him?

A. Yes.

Q. But you didn't go into his place of business and inquire whether he was there or not?

A. No.

Q. What was the reason you didn't do that?

A. The reason was that we were not to be suspicious of the whereabouts of the defendant to the rest of the people.

Q. You knew in advance of this raid, did you not, that they were out to get Henry, that he is the man they wanted?

A. I did the day before, yes. [114]

Q. And isn't it a fact, Pestano, that you were supposed to go down to Smith Street and if he were there and left the place, to tip the officers off that he had left Smith Street; isn't that what you were supposed to do?

A. I am an officer myself.

(Testimony of Harry L. Pestano.)

Q. Will you answer my question, please. I didn't ask you whether you were an officer yourself or not. That had nothing to do with the question.

A. I was to let Officer Ferry know.

The Court: There is an implication in your question that he isn't a police officer and that he was going to tip the officers off. That's why he said that. He is a police officer and he got an inference from your question that you didn't appreciate that he was a police officer.

Mr. Soares: Well, I will reframe the question, then, so there won't be any misunderstanding of my knowledge of your being a police officer.

Q. (By Mr. Soares): Weren't you supposed to go down to Smith Street and tip the police officers off at Drier Manor if the defendant left Smith Street?

A. Not at Drier Manor, no. I was supposed to let Officer Ferry know.

Q. Well, Ferry was with you, wasn't he?

A. Yes, he was.

Q. What? [115]

A. He was on his own route. I was on my own. I was supposed to have Smith Street.

Q. Oh, your specific instruction was to tell Ferry what you found? A. Yes.

Q. Did you hear any instructions given to Ferry as to what he was to do? A. No, sir.

The Court: Ferry.

Mr. Soares: Ferry. I am sorry.

(Testimony of Harry L. Pestano.)

Q. (By Mr. Soares): Your answer is "no"?

A. No, sir.

Q. You did not see the defendant?

A. I did not.

Q. That is, on Smith Street?

A. Yes, I did not see him on Smith Street.

The Court: Please keep your voice up so we can hear you.

What was that answer?

The Witness: I did not see the defendant on Smith Street.

Q. (By Mr. Soares): You did not see him on the day of the raid—

Mr. Soares: Withdraw that.

Q. (By Mr. Soares): You did see him on the day of the [116] raid though, or the night of the raid? A. At the place, yes, I did see him.

Q. That is, 803 Hausten Street?

A. Yes, sir.

Q. Well, how did you come to go out to Hausten Street?

A. With Officer Ferry. Officer Ferry has his own car, and from Smith Street—

Mr. Soares: Please speak up.

A. (Continuing): Officer Ferry has his own car, so from Smith Street we proceeded to 803 Hausten Street.

Q. Why did you give up the attempt to locate Henry?

A. We didn't give up. We called in for further

(Testimony of Harry L. Pestano.)

instructions as to what to do, so in the meantime we were told to come back over to 803 Hausten Street.

Q. How long were you in the attempt to locate the defendant on Smith Street?

A. I would say about fifteen to about half an hour.

Q. After half an hour you called up and said you couldn't locate him?

A. I didn't call them. Officer Ferry did.

Q. In your presence? A. Yes, sir.

Q. And then you got instructions from Ferry to accompany him back? A. Yes, sir. [117]

Q. To 803 Hausten Street.

Mr. Soares: Will your Honor pardon me a minute.

Mr. Landau: I notice it is four o'clock. I was wondering if we would finish with this witness.

The Court: I don't know either. You said "back to Hausten Street" in your last question.

Mr. Soares: I didn't mean to infer he had already been to Hausten Street.

The Court: Very well.

Mr. Soares: It is like saying "back yonder."

The Court: Under the same admonition I have given the jury at the outset, namely, that they are not to discuss this case with anyone or to read newspaper articles concerning this case, or to listen to other people discuss this case, or to listen to radio commentators discuss this case or report news-wise

(Testimony of Harry L. Pestano.)

upon this case, we will stand adjourned at this time until 10 o'clock tomorrow morning.

(Thereupon, at 4:00 p.m. an adjournment was taken until 10:00 a.m. the following morning, January 6, 1950.) [118]

January 6, 1950

(The Court convened at 10:00 a.m.)

The Clerk: Criminal No. 10,253, United States of America, Plaintiff, versus Winston Churchill Henry, Defendant; case called for further trial.

The Court: Are the parties ready?

Mr. Soares: Ready for the Defendant.

Mr. Hoddick: Ready for the Plaintiff.

The Court: Note the presence of the Jury and the Defendant together with his attorneys.

### HARRY L. PESTANO

a witness in behalf of the Plaintiff, having previously been sworn, resumed and testified further as follows:

#### Cross-Examination (Continued)

The Court: You are Mr. Pestano?

The Witness: Yes.

The Court: I remind you that you are still under oath and under cross-examination. You may continue.

(Testimony of Harry L. Pestano.)

By Mr. Soares:

Q. Mr. Pestano, did I understand correctly yesterday you testified that these cigarettes so-called are in the same shape that they were when you found them?

A. Yes, with the exception of my signature.

Q. Well, I mean the cigarettes, the cigarette itself. I don't mean the stuff that is written.

A. Yes, sir.

Q. And when did you say you put your initials on it?

A. About two or two and one-half hours after the raid.

Q. And were you the first one to put initials on the cigarette?

A. On the ones I found, yes, sir.

Q. And which did you find—how many?

A. Six.

Q. Under the cushion?

A. Of the sofa, yes.

Q. Sofa? Did you find any other of the exhibits in this case? A. No, sir.

Q. Was this raid that you were part of in July the first raid that you knew of being planned against these premises at 803 Hausten Street?

A. Yes, sir.

Q. You knew nothing about the plans for an earlier raid? A. No, sir.

Q. How long did you say you had been on the vice squad? A. A year and one-half.

(Testimony of Harry L. Pestano.)

Q. Were you at all familiar with these premises prior [120] to your going out there on this date in July?

A. No, sir. That is the first time I had been there.

Q. You hadn't been briefed on them in connection with your position on the vice division? You say they never briefed you about these being premises being suspected of any law violations?

A. Well, I was told as to the address. But as to the premises I had no way—

Q. That is, you had been told that 803 Hausten Street, that it was under police suspicion?

A. Yes.

Q. As a matter of fact, they tell all the vice men the different places in town—

Mr. Hoddick: I object. I don't think that has any bearing on this case, your Honor.

Mr. Soares: Cross-examining the witness.

Mr. Hoddick: I don't know what you are doing, Mr. Soares.

The Court: Well, true, you are entitled to a wide range on cross-examination. I can't particularly see any relevancy, but he may answer the question nevertheless.

Mr. Hoddick: Answer the question, please.

The Witness: The question again?

Q. (By Mr. Soares): They tell the vice men the different places in town that are under police suspicion? [121]

(Testimony of Harry L. Pestano.)

A. Just that particular place that's going to be raided, that's all.

Q. Well, I won't pursue it in view of the Court —at any rate, you have never heard anything wrong with 803 Hausten Street until just prior to the raid? A. The day before, yes.

Q. Up to that time it had not be discussed in your hearing? A. No, sir.

Q. This sofa, as you call it, was in what room?

A. It is, I believe, it is in the living room.

Q. And what other furniture was in the living room?

A. There was an easy chair, that sofa; I believe there was a table, but it was in an adjacent room.

Q. But I mean in that room.

A. That's all I can remember.

Q. This sofa and an easy chair? A. Yes.

Q. When you came into that room was anybody with you?

A. Everyone participated in the raid, with the Defendant and some people he had was in the room at the same time.

Q. But I mean, did they come in with you?

A. Officer Ferry and myself came in at the same time.

Q. But when you came in there was no one in the room? [122] A. There was.

Q. Who was in the room when you came in?

A. Mrs. Thomas and her sister and Mrs. Thomas' daughter, a Mr. Montgomery and Sergeant Sasaki,

(Testimony of Harry L. Pestano.)

Officer Marcotte, Officer Shaffer and Officer Ferry.

Q. Were they all standing up or some of them seated? A. Some of them were seated.

Q. And can you tell us who was seated and where they were seated? I am talking about the living room only.

A. Mrs. Thomas, her sister and her daughter were sitting on the sofa. Mr. Montgomery was sitting on an easy chair.

Q. The rest were standing around?

A. Yes.

Q. And did you require Mrs. Thomas and her sister and daughter to get off the sofa?

A. I didn't do that but I believe one of the officers did.

Q. Do you know who it was?

A. No, sir, I can't recall.

Q. You do know that somebody ordered them off the sofa? A. Yes, sir.

Q. And it wasn't you? A. No, sir.

Q. Nevertheless you were the one who searched the sofa? A. Yes, sir. [123]

Q. Although somebody else had ordered them off? A. Yes.

Q. Had you received orders to search that particular sofa? A. Yes.

Q. Who gave you those orders?

A. Captain Whitford and Sergeant Sasaki at that time.

Q. Both of them? A. Yes.

(Testimony of Harry L. Pestano.)

Q. They are both your superior officers, weren't they? A. Yes.

Q. And I believe you said that when you got in the room Sasaki and Whitford were among those that were already in the room.

A. I don't believe I mentioned Captain Whitford, but Sergeant Sasaki was there.

Q. Had Captain Whitford been in the room before you went in?

A. That I don't know but after I was there he came in.

Q. You don't know at what point he arrived, is that it? A. No, sir.

Q. Sasaki was there, however?

A. Yes, sir.

Q. Did Sasaki have anything in his hands at that time? [124] A. At that time, no.

Q. Did you ever see him with something in his hand? A. Yes.

Q. What was it? A. He had that bottle.

Q. He acquired that after you found the cigarettes in the sofa?

A. My cigarettes was the last item that was found.

Q. Are you sure of that?

A. I believe mine was the last.

Q. Well, then, who had this bottle?

A. Sasaki had it.

Q. I thought you said he didn't have it until afterwards.

A. He had it before I found my cigarettes, yes.

(Testimony of Harry L. Pestano.)

The Court: Which bottle are you both talking about?

The Witness: The large.

Mr. Soares: It is U. S. Exhibit 1, the Ovaltine bottle.

The Court: Is that the one you are talking about?

The Witness: Yes.

Q. When you came into the living room, as you call it, Sasaki was in there? A. Yes.

Q. But he did not have this bottle in his hands?

A. No, sir, I believe it was on the table with Agent [125] Wells.

Q. Did you ever see what was in that bottle, Exhibit 1, the Ovaltine bottle? A. Yes, I did.

Q. Was that while they were counting the capsules? A. Yes, sir.

Q. And when did that take place with relation to the time you found the cigarettes, before or after?

A. After.

Q. And where did you first see this bottle, Exhibit 1, the first time you ever saw it?

A. Sergeant Sasaki had it in his hand.

Q. When you first saw it Sasaki had it in his hand? A. Yes, sir.

Q. But when you first saw Sasaki he did not have it in his hand? A. No, sir.

Q. And where did he get it from, did you see?

A. No.

Q. Well, did he leave the room and come back with the bottle? A. Yes.

(Testimony of Harry L. Pestano.)

Q. Or was he there all the time you were there?

A. He left the room.

Q. Alone? [126]

A. I believe he did. I can't recall if he left alone.

Q. Did anybody give him any orders that caused him to leave the room?

A. I can't recall. I was busy myself.

Q. Well, you have received orders to search the couch? A. Yes.

Q. And you got those orders from Sasaki?

A. Yes.

Q. Now, did he give you those orders before he left the room or after he came back?

A. Before he left the room.

Q. And just what did he say to you in that connection?

A. Well, he pointed out the officers to search the chairs.

Q. Well, what did he say to you?

A. He pointed out the sofa.

Q. Pointed at you and said, "Search the sofa"?

A. Yes.

Q. What orders did Whitford give?

A. Same thing.

Q. Do you know any reason why it was necessary for both of them to give you such a simple order as that?

Mr. Hoddick: Objection. It calls for a conclusion on the part of the witness.

(Testimony of Harry L. Pestano.)

Mr. Soares: I asked him if he knew. I am not asking [127] to advance—

The Court: Overruled.

Q. Do you know any reason why it was necessary for two of your superior officers to give you such a simple order? A. No, sir.

Q. Did they give you the orders—withdraw that. Who first gave you the order to search the couch?

A. They both, simultaneous.

Q. A duet? A. Yes.

Q. And both pointed at you both said, "Search the couch"?

A. Well, they didn't both point at me directly. They pointed to the rest of the officers and then they came to me. Sergeant Sasaki pointed at me first and then Captain Whitford might have pointed to somebody else. But they all came back to me.

Q. Well, I thought you said Sasaki and Whitford—"simultaneous" I believe was the word you used—gave you the orders to search the couch.

A. Yes, we were with that group.

Q. Do you want to change that testimony now?

A. No, sir.

The Court: Excuse me. You drop your voice at the end of what you are saying and you don't enunciate. Will you [128] keep your voice up and pronounce all of your words clearly so that we can hear each word, and talk a bit louder?

The Witness: Yes.

Mr. Soares: That was all of the cross-examination.

(Testimony of Harry L. Pestano.)

The Court: All right. Redirect?

Mr. Hoddick: May I have about a half minute of the Court's time, please?

The Court: Yes.

### Redirect Examination

By Mr. Hoddick:

Q. Mr. Pestano, when you were searching the couch—withdraw that. While you were searching the couch, actively engaged in searching the couch, were you fully aware of everybody who was in the room? A. No, sir.

Q. Were you aware of what each person in the room had in his or her hands? A. No, sir.

Q. Do you know whether Sergeant Sasaki was in the room all the time while you were searching the couch?

A. No, I only saw him at the time I came in and after a while he told us to search the couch, after.

Q. But while you were searching the couch, are you certain whether Sergeant Sasaki was there all the time or not? A. No, sir. [130]

Q. Are you certain whether he was in the room at all while you were searching the couch?

A. Yes. At the beginning he was.

Q. Did you have any conversations with Sergeant Sasaki while you were searching the couch?

A. No, sir.

Q. Did you stand and look at Sergeant Sasaki while you were searching the couch?

A. No, sir.

(Testimony of Harry L. Pestano.)

Q. Do you know what Sergeant Sasaki had in his hands while you were searching—

Mr. Soares: We now object to this question as leading and suggestive. The rule as to leading questions still applies.

The Court: The question is not leading. Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Hoddick): The question, Mr. Pestano, is, do you know what Sergeant Sasaki had in his hands while you were searching the couch?

A. While I was searching the couch my back was turned to the rest of the crowd as the couch is up against the wall. I didn't look around. My attention was fully focused on the couch.

Q. Well, how do you know what he had in his hands [130a] while you were searching the couch?

A. After awhile, yes, I saw him with the bottle.

Q. After awhile? A. Yes.

Q. How much?

A. After I found my mariuanas. I mean after I found the—

The Court: Stricken. Disregard it, members of the Jury. Don't make that mistake again. After you found your cigarettes—

A. (Continuing): After I found my cigarettes and called Agent Wells and he in turn brought the Defendant, I saw Sergeant Sasaki with the bottle in his hand.

Q. He then had the bottle in his hand?

A. Yes, sir.

(Testimony of Harry L. Pestano.)

Mr. Hoddick: No further questions.

Recross-Examination

By Mr. Soares:

Q. How long did it take you to discover those cigarettes from the time you told, from the time you were told to search the couch until you found them, about how long?

A. I'd say a matter of minutes.

Q. What's that? A matter of seconds did you say? A. Oh, about a little over a minute.

Q. In other words, from the time you were told to search the couch by Sasaki until the time you found the [131] cigarettes and called for Agent Wells, about a minute, a little over a minute had elapsed? A. About a minute or a little over.

Q. During the time you were in that room there was a period when Sasaki had nothing in his hands and then after the search by you of the couch you found, you saw that he did have this bottle?

A. Yes.

Q. Exhibit 1 in his hand? A. Yes, sir.

Q. Did you see where he got the bottle from?

A. No, sir.

Q. And the first time you saw it was when he had it in his hand after you had found the cigarettes? A. Yes, sir.

Mr. Soares: No further questions.

Q. (By Mr. Hoddick): Mr. Pestano, what was Sergeant Sasaki's position at the time he asked you to search the couch? A. Sergeant.

(Testimony of Harry L. Pestano.)

Q. No. How was he? Was he standing or sitting down? A. He was standing.

Q. At that time did you look at Sergeant Sasaki's hands?

A. No, sir, I just could see half of his body, that's [132] all.

Mr. Hoddick: No further questions.

Q. (By Mr. Soares): You have no doubt that the man you have been referring to as Sergeant Sasaki is the man who testified as the first witness in this case, have you?

A. Sergeant Richard Sasaki, yes.

Q. No doubt that that was the same man?

A. Yes, sir.

Mr. Soares: That's all.

Mr. Hoddick: No further questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Hoddick: Officer Shaffer, please.

### PAUL SHAFFER

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

#### Direct Examination

The Court: Will you please state your name?

The Witness: Paul Shaffer.

The Court: Age?

The Witness: 33.

(Testimony of Paul Shaffer.)

The Court: Residence?

The Witness: House 137 New Mill Camp, Aiea.

The Court: Occupation? [133]

The Witness: Police Officer.

The Court: Employed by?

The Witness: The Honolulu Police Department.

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Mr. Shaffer?

A. Since 1941.

Q. And in July of 1949 with what branch of the service were you, with what branch of the service did you work?

A. I was working with the vice division.

Q. Were you assigned to the vice division?

A. Yes, sir, I was.

Q. And at that time how long had you been with the vice division?

A. Approximately about a month.

Q. Now, do you know the Defendant in this case, Winston Churchill Henry?

A. Yes, I do.

Q. Will you point him out, please?

A. Right over there. [134]

(Testimony of Paul Shaffer.)

Q. The man on the far end of the table?

A. Yes, sir.

Mr. Hoddick: May the record show that the witness has identified the Defendant?

The Court: Which table?

The Witness: The man sitting next to Mr. Soares in the brown suit.

Mr. Soares: Which side?

The Court: Which side?

The Witness: On Mr. Soares' left.

The Court: All right.

Q. (By Mr. Hoddick): Mr. Shaffer, did you participate in a search of the premises of 803 Hausten Street on July 16, 1949?

A. Yes, I did.

Q. And did you have occasion after that search to speak with the Defendant concerning anything you found? A. Yes, I did.

Q. And what did the Defendant say?

A. I interviewed the Defendant in the offices, the vice offices of the police station in regard to a gun that I found at the scene.

Q. At about what time was that, Mr. Shaffer?

A. At approximately 1 o'clock, 1:05. When I found the gun— [135]

Mr. Soares: Just a minute. The question has been answered. If Counsel has another question, we want an opportunity to object.

The Court: Just answer the question, and I want to know whether it is a.m. or p.m. You said something about 1 o'clock.

(Testimony of Paul Shaffer.)

The Witness: I don't understand that, whether the time I found the gun or when I talked to him.

The Court: When you talked to him.

The Witness: Oh, it was in the afternoon, approximately about 5:00 p.m.

Q. That's when you interrogated the Defendant at the station? A. Yes, sir.

Q. Now, for purposes of the record what time did you find the gun?

Mr. Soares: We object to any reference or testimony with reference to a gun, if the Court please, as incompetent, irrelevant and immaterial.

Mr. Hoddick: I will withdraw it.

Mr. Soares: As not pertaining to any issue in this case.

Q. (By Mr. Hoddick): During the conversation with the Defendant, what did he say?

Mr. Soares: We object to that, if the Court please, [136] first on the ground that the corpus delicti has not been shown, and anything the Defendant said in the nature of an admission or confession would not be admissible, and anything that was not in the nature of an admission or confession would be incompetent, irrelevant and immaterial.

Mr. Hoddick: I submit that the corpus delicti has not been proved, your Honor, and in the interests of presenting an orderly picture to the Jury and to the Court we felt that it was best that Mr. Shaffer testify at this time concerning that conversation. It is in the nature of an admission as

(Testimony of Paul Shaffer.)

to a material element concerning this case. And I think it is properly admissible at this time. We will prove the *corpus delicti* before the day is through.

The Court: You had better prove it first. I am disposed to sustain the objection at this time until you have established at least that a crime has been committed.

Mr. Hoddick: May I have the privilege of recalling Mr. Shaffer from the stand?

The Court: Yes.

Mr. Hoddick: Will you step out again, please?

(Witness excused.)

Mr. Hoddick: Mr. Wells, will you take the witness stand?

WILLIAM K. WELLS

a witness on behalf of the Plaintiff, being duly sworn, testified as follows: [137]

Direct Examination

The Court: What is your name?

The Witness: William K. Wells.

The Court: Age?

The Witness: Fifty-seven.

The Court: Residence?

The Witness: 856-20th Avenue, Honolulu, T. H.

The Court: Occupation?

The Witness: Acting District Supervisor, Bureau of Narcotics, U. S. Treasury Department.

(Testimony of William K. Wells.)

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

By Mr. Hoddick:

Q. How long have you been with the Bureau of Narcotics, Mr. Wells?

A. Since November 21, 1921.

Q. And have you always been in service with them in Hawaii?

A. In Hawaii and in the mainland.

Q. Where did you serve on the mainland?

A. Beg pardon?

Q. Where did you serve on the mainland? [138]

A. In Michigan, Ohio, North, South Dakota, Wisconsin, Nebraska and the State of Minnesota.

Q. Do you know the Defendant in this case?

A. I do.

Q. Will you point him out, please?

A. The gentleman sitting on the left of Mr. Soares.

Mr. Hoddick: May the record show that the witness has identified the Defendant?

The Court: Yes.

Q. Did you have occasion to search the premises at 803 Hausten Street? A. Yes, sir.

Q. On what date? A. On July 16, 1949.

Q. And did you have any kind of a search warrant for that purpose?

(Testimony of William K. Wells.)

A. I had a search warrant.

Q. And did you request anyone's assistance in the making of that search?

A. I went to the vice squad first on the night of July 12, 1949, to ask Captain Whitford to assist me to search the rear house located at 803 Hausten Street.

Q. Approximately what time did you arrive in the vicinity, immediate vicinity of 803 Hausten Street?

A. On July 16, about 8:30 a.m. [139]

Q. And what did you do when you got there?

A. With Officer Whitford, Captain Whitford, Sergeant Alfred Sasaki—I mean Alfred Sousa, Richard Sasaki and Theodore Kinney we concealed ourselves at 807-B Hausten Street with the permission of the owner.

Q. And how long did you stay there?

A. Stayed there until 12:30, 12:38 p.m., when I saw the Defendant walking towards Hausten Street.

Q. Then what did you do?

A. I spoke to Captain Whitford and Richard Sasaki and left the duplex apartment and proceeded towards a parked Packard car, license U-6696. The Defendant was outside of the car. I said, "Henry, I got a search warrant to search your premises."

Q. And then did he say anything?

A. He looked at me and said "O.K." Then we

(Testimony of William K. Wells.)

proceeded, that is, the Defendant, Captain Whitford, Sasaki, Sousa and Theodore Kinney, we proceeded towards the stucco house which is located in the rear of 803 Hausten Street. Before we got to the building the Defendant—

Mr. Hoddick: One second. May I have this marked for identification, your Honor, a photograph?

The Court: Yes.

The Clerk: U. S. Exhibit No. 10 for identification.

(The photograph referred to was marked "U. S. Exhibit [140] No. 10 for Identification.")

(Mr. Hoddick shows photograph to Messrs. Soares & Landau.)

Q. (By Mr. Hoddick): What happened after you got into the house or—

A. Prior to going into the house the Defendant called to someone to unlatch the lock to the screen door. A little girl let us in and I got into the living room with the Defendant. I served the search warrant on the Defendant and asked him if he wanted me to read the search warrant to him. He said, "No, Billy." After he accepted the search warrant I turned around to the boys and I said, "All right, let's start searching." In the meantime Officer Sasaki had gone upstairs and brought down Mrs. Helen Thomas, Charles Montgomery and Dolores Allen. That's Mrs. Thomas' sister. I went upstairs

(Testimony of William K. Wells.)

with the Defendant accompanied by Sergeant Sousa. We proceeded to search the bedrooms upstairs, and while we were searching the mauka bedroom, that is, the bedroom occupied by the Defendant—

Mr. Soares: We object to that, if the Court please. This is a conclusion of the witness.

The Court: He can testify as to how he knows.

Mr. Soares: Well, of course that is a vice of narrative testimony. A lot of stuff has gone in and has to be taken out later. The witness has gone far beyond answering the question. [141]

Mr. Hoddick: I think I asked him what happened after he got in the house.

Mr. Soares: He asked him what he found.

Mr. Hoddick: I didn't ask him what he found.

Mr. Soares: I don't want to bandy words with you. I will submit the matter to the Court.

The Court: You may proceed by question.

Q. (By Mr. Hoddick): You stated that you went upstairs for the purpose of making a search?

A. Yes, sir.

Q. And what room did you search upstairs?

A. Beg pardon?

Q. What room did you search upstairs?

A. I searched the two bedrooms upstairs. While I was searching the mauka bedroom—

Q. What happened?

A. —Officer Sasaki yelled for me to come downstairs. I took the Defendant with me to the

(Testimony of William K. Wells.)

rear of the building and Officer Sasaki said in the presence of the Defendant, "I found something." I looked in this hole. I saw an Ovaltine bottle.

Q. And did you tell Sergeant Sasaki what to do with it?

A. I told Sergeant Sasaki to hold the bottle at the [142] top of it and for him to come upstairs with us. He came upstairs.

Q. Why did you tell him to come upstairs?

Mr. Soares: We object to the conclusions or undisclosed reasons of the witness, if the Court please. Let him tell the facts in the proper way, and the proper function will determine why he did it—

Mr. Hoddick: Your Honor, I make no point of this. But his reason for asking Sergeant Sasaki to come upstairs may assist the jury in interpreting these facts, in understanding the testimony of the witnesses.

Mr. Soares: What opportunity have we to produce evidence to contradict his testimony as to his undisclosed reasons?

The Court: He is being asked to disclose it.

Mr. Soares: That's the point. They were undisclosed to anybody at the time. If he had made a statement at the time, that is one thing. But for him to keep locked in his breast certain reasons that he had and not make them known and then come to the Court and testify to them we submit is not proper evidence.

The Court: Overruled.

(Testimony of William K. Wells.)

Mr. Soares: Save an exception.

Mr. Hoddick: Will you answer the question, please, Mr. Wells?

A. I told Sergeant Sasaki at the time downstairs to be [143] sure—I mean to hold the bottle at the top so we can have Lieutenant Fraga to take some prints. We proceeded upstairs.

Q. Now, what happened after you got upstairs?

A. And then, while searching the makai bedroom Officer Case yelled upstairs for me to come downstairs.

Q. Approximately how long was that after you had gotten upstairs?

A. A good 15, 20 minutes, I think.

Q. You went downstairs in response to the call of Officer Case?

A. Went downstairs. In the sun porch, in the back of the patio I mean, there was a couch there. Lying on the couch was a bottle containing some white substance.

Q. And then what did you do?

A. I gave Officer Case the same instructions.

Q. That you had given Officer Sasaki?

A. Yes, sir.

Q. And then?

A. And then we proceeded back upstairs.

Q. For what purpose?

A. To continue the search.

Q. Did you? A. Yes, sir.

Q. And what happened next?

(Testimony of William K. Wells.)

A. While searching, when we about finished the search [144] of the bedroom, I was called downstairs again, and Officer Ferry showed me where he had found a box in a brown paper bag in the back of the eaves in the rear of the house. I counted the contents in the box and it contained 29 cigarettes.

Q. And what did the contents of the paper bag look like?

A. Well, it looked like, I would say, Garfield laxative tea.

Q. And then what happened after you had counted the cigarettes and inspected the contents of the paper bag?

A. I instructed Officer Ferry to hold on to it. We proceeded upstairs and when we got through searching upstairs we came downstairs, proceeded to search the kitchen.

Q. Did anything happen while you were searching? A. Yes, searched the kitchen.

Q. Did anything unusual occur while you were searching the kitchen?

A. Well, while I was searching the kitchen I was called in the living room by Officer Pestano and he showed me where he had found six cigarettes on a couch.

Q. And then?

A. Then I went back to the kitchen, proceeded to search the kitchen, and then I asked the Defendant if he had the key to the door of a closet which led underneath the stairway.

(Testimony of William K. Wells.)

Q. And what did the Defendant say? [145]

A. Well, he said you can't—he didn't have it. So I told him that I have to search that closet, I had a search warrant. He then told Mrs. Thomas to go upstairs and get the key, which she did, and came back and handed it to me, and I opened the door, went in and proceeded to search the closet.

Q. Did you find anything in the closet?

A. I found a loose panel in the closet.

Q. Did you speak to the Defendant about this loose panel?

A. Yes, sir, I said to the Defendant, "Shorty, this is a good plant, but it's empty." He said it was there before he moved in.

Q. Then did that mark the completion of your search of the premises? A. Yes, sir.

Q. What did you do then?

A. Then I came to the kitchen to wash my hands. I had a conversation with the Defendant. I said to the Defendant, "Shorty, you have a nice place here. How long have you been living here?" He said, "Oh, not very long." Then I went to the dining room; in the presence of the Defendant I counted the contents in the Ovaltine bottle and it contained 915 capsules.

Q. Did you take possession of the Ovaltine bottle at [146] that time?

A. After Lieutenant Fraga had dusted all the evidence and tried to lift some prints.

Q. And from whom did you receive the Ovaltine bottle?

(Testimony of William K. Wells.)

A. From Officer Sasaki. He was right there. We then initialed—

Q. Just one second. Did you put any identifying marks on it? That was going to be my question.

A. Yes, sir. Then I then initialed the bottle after Sergeant Sasaki.

Q. And when you counted the contents, what was the count? A. 915 capsules.

Q. Did you ever release possession of that bottle to anybody else?

A. No, sir. Well, I did, yes, sir. On July 18, 1949.

Q. And to whom did you give it?

A. I gave that bottle to Mr. G. J. Carr, U. S. Customs Chemist, for analysis.

Q. Did you ever receive an Ovaltine bottle back from Mr. Carr? A. I did, on July 22, 1949.

Q. And was that the same bottle?

A. Yes, sir.

Q. How could you tell? [147]

A. It had my initials on it, W.K.W.

Q. Had you put your initials on any other Ovaltine bottles? A. Not that day.

Q. Showing you U. S. Exhibit No. 1 for identification purposes, can you identify it, Mr. Wells?

A. Yes, sir. That's my initials, W.K.W., 7/16/49.

Q. And what is Exhibit No. 1? Where did you get it?

(Testimony of William K. Wells.)

A. It contained 915 capsules that I received from Sergeant Sasaki at, in the rear house at 803 Hausten Street on July 16, 1949.

Q. Is that the bottle which you gave to Mr. Carr, the Customs chemist, on July—what was the date? A. 18, 1949. Yes, sir.

Q. Was there any change in the condition of that bottle or in its condition, in the condition of its contents, from the time that you received it from Sergeant Sasaki until the time that you gave it to Mr. Carr? A. No, sir.

Q. After receiving that bottle back from Mr. Carr on July 22 until you brought it into court, was there any change in its condition or in the condition of its contents? A. No, sir.

Q. Did you receive anything from Officer Case?

A. I received a bottle from Officer Case. I took the [148] cork out.

Q. Where did you receive it?

A. In the kitchen, in the house in the rear of 803 Hausten Street. And I put a little of the contents on my tongue, rubbed it on my tongue. The Defendant said, "Man, don't do that, Billy; that's dynamite."

Q. What did you do with that bottle after that?

A. And I said, "This bottle must contain about 200 grains." The Defendant said, "No, more than that."

Q. And then what did you do with the bottle?

A. I returned it back to Officer Case and told

(Testimony of William K. Wells.)

him to hold on to the bottle until we got back to the vice squad office where we put a wrapper around it and initialed it down there, and I took possession of same.

Q. You put your initials on the bottle?

A. Yes, sir.

Q. Showing you, Mr. Wells, U. S. Exhibit No. 5 for identification purposes, I will ask you to identify it? A. That's my initials, W.K.W.

Q. Is that the bottle which you received from Officer Case? A. Yes, sir.

Q. From the time which you finally received it from Officer Case at the police station—withdraw that question. Did you ever give that bottle to anybody else? [149]

A. On July 18, 1949, I gave this bottle to Mr. G. J. Carr, the chemist, for analysis.

Q. From the time that you received that bottle from Officer Case at the police station until the time you gave it to Mr. Carr, was there any change in the condition of the contents of that bottle?

A. Yes, sir. You mean when I received—

Q. From the time you received it from Officer Case at the police station until the time you gave it to Mr. Carr, was there any change in the condition of the contents of the bottle?

A. Just the stickers on it.

Q. The contents of the bottle? A. No, sir.

Q. Was that bottle returned to you by G. J. Carr?

(Testimony of William K. Wells.)

A. It was returned to me on July 22, 1949.

Q. And have you had it in your possession since that date? A. Yes, sir.

Q. Until when?

A. Until the, until when the trial started the other day.

Q. And to whom did you give the bottle at that time? A. To you.

Q. Now, from the time that you received that bottle [150] from Mr. Carr until the time that it was marked for identification purposes here in court, was there any change in the condition of the contents of that bottle? A. No, sir.

Q. Did you receive anything from Officer Ferry?

A. Yes, sir, I received a box containing 29 cigarettes and a brown paper bag containing a substance that looks like Garfield laxative tea.

Q. And where did you receive those two items?

A. In the dining room at the rear house at 803 Hausten Street.

Q. And what did you do with those two articles? Withdraw that. Did you put any identifying marks on those two articles?

A. I placed my initials on it.

Q. Showing you U. S. Exhibit No. 6 for identification purposes and 7 for identification purposes, I ask you if you can identify it.

A. This is the box that I received from Officer Ferry. That's my initials, W.K.W., dated 7/6/49.

Q. Did you examine the contents at the time

(Testimony of William K. Wells.)

you received it from Officer Ferry or before?

A. I just counted the cigarettes.

Q. Will you look in that box at this time and tell me if the contents are similar or the same?

A. About the same.

Q. Now, looking at U. S. Exhibit No. 7 for identification purposes, do the contents look like Garfield laxative tea? A. It does.

Q. Did you ever give either of those two articles to anybody else?

A. I gave the two articles to Mr. Carr, the chemist, on July 18, 1949, for analysis.

Q. Did you receive those two articles back from Mr. Carr at any time?

A. I received it back on July 22, 1949.

Q. From the time these two exhibits were delivered to you by Mr. Ferry until the time you gave them to Mr. Carr, was there any change in the condition of their contents? A. No, sir.

Q. From the time you received them from Mr. Carr on July 22 until the time you brought them into court, was there any change in the condition of their contents? A. No, sir.

Q. Did you receive anything from Officer Harry Pestano? A. I received—

Q. After this search.

A. No, sir. I received the six cigarettes from him at the vice office and I kept it in my possession.

(Testimony of William K. Wells.)

Q. Did you ever give them to anybody else?

A. Until July 18, 1949, when I gave the six cigarettes to Mr. G. J. Carr, chemist, for analysis.

Q. Did you put any identifying marks on those cigarettes? A. I did.

Q. Showing you U. S. Exhibit for identification purposes No. 9 and 10, I will ask you to identify them.

The Clerk: That's 8 and 9.

Q. Excuse me. Exhibits 8 and 9.

The Court: For identification.

A. These are the six cigarettes that I obtained from Officer Harry Pestano at the vice squad office on July 16, 1949.

Q. Now, from the time that you received those six cigarettes from Harry Pestano until the time that you gave them to Mr. Carr on July 18, was there any change in those cigarettes?

A. No, sir.

Q. That is, except for initials that were put on them? A. Yes, sir, that's all.

Q. And from the time you received them from Mr. Carr until the time you brought them into court, was there any change in their condition?

A. No, sir.

Q. Where do you keep these? Where did you keep these [153] various exhibits which I have asked you to examine when you had them in your possession?

(Testimony of William K. Wells.)

A. Well, it's what we call a strong room in my office, room 575, Alexander Young Building, Honolulu, T. H.

Q. Who has access to that strong room?

A. Only me.

Q. Only you? A. Yes, sir.

Q. Was there a Mrs. Thomas at 803 Hausten Street at the time you made the search?

A. Yes, sir.

Q. Before you left the premises at 803 Hausten Street, did the Defendant say anything to you concerning Mrs. Thomas?

A. I went into the living room where she was sitting down. In the presence of the Defendant I asked Mrs. Thomas the age of the two young girls. The Defendant spoke up and said, "Don't ask any questions." I then told her that I just asked that question because I think the two young children should be taken to some of her friends' place.

Q. Did you take Mrs. Thomas down to the police station with you? A. Yes, sir.

Q. Did the Defendant say anything concerning that?

A. Oh, while in the kitchen he told me in the kitchen, he said, "Billy, you don't have to take her down; she doesn't [154] know anything about this stuff." I said, "Well, then, is it your stuff?" He just smiled and didn't reply.

Mr. Hoddick: No further questions.

The Court: Just a minute. We will take our usual recess in a moment. Very well.

(Testimony of William K. Wells.)

(A recess was taken at 11:00 a.m.)

The Court: Note the presence of the Jury and the Defendant together with his attorneys. You may proceed on cross-examination.

### Cross-Examination

By Mr. Soares:

Q. Mr. Wells, you are the one who arrested the Defendant? A. Yes, sir.

Q. And where was he when you arrested him?

A. After the—

Q. I simply asked you where?

A. When we got upstairs to the mauka bedroom, coming down—

Q. What time was that?

A. I would say it was between 1 o'clock and 1:20 p.m.

Q. And in relation to your serving him the search warrant, was it before or after the search warrant was served?

A. After the search warrant was served. [155]

Q. How long after?

A. I would say about half an hour or 40 minutes.

Q. At any rate, after you served the search warrant you never let him out of your sight, did you?

A. No, sir.

Q. Whenever you called from up and down the stairs you required him to accompany you?

(Testimony of William K. Wells.)

A. Yes, sir.

Mr. Soares: No further questions.

The Court: Redirect?

### Redirect Examination

By Mr. Hoddick:

Q. Mr. Wells, when you were called downstairs by Sergeant Sasaki, for instance, what did you say to the Defendant?

Mr. Soares: We object to that, if the Court please, as not proper redirect. We didn't go into any conversations or any occurrences. The cross-examination was limited to the service of the search warrant, the placing of the Defendant under arrest, and that fact that he never left him out of his sight. No conversation.

Mr. Hoddick: There was a question asked of this witness as to whether he required the Defendant to go downstairs. I want to know what the nature of this requirement was, if it was a requirement or it was merely a request. [156]

Mr. Soares: I didn't understand that to be the question.

The Court: I didn't either. You had better clarify your question.

Q. (By Mr. Hoddick): May I ask when Sergeant Sasaki called you to come downstairs, what did you say to the Defendant?

A. I said, "Shorty, come on downstairs with

(Testimony of William K. Wells.)

me." He accompanied me downstairs to the back of the building.

Q. And if he had refused to go downstairs with you, what would you have done?

Mr. Soares: We object to the speculation.

The Court: Sustained.

Mr. Hoddick: Your Honor, if I might interpose a short argument before the ruling is made—would you mind withdrawing the ruling for a minute?

The Court: I can't see possibly what he might have done, if it has any bearing on what he did do—what he did do, not what he might have done—

Mr. Hoddick: Your Honor, I think the question of whether the Defendant—if I can foresee where Mr. Soares is headed—the question of whether the Defendant was under arrest prior to the time that these various substances were found—

The Court: Well, if you want to be heard, I will temporarily withdraw the ruling to allow you to be heard. But my ruling was made based on the fact that we are interested in [157] what he, the witness, did do, not what he might have done. If you want to be heard until I find out what you are driving at I will excuse the Jury and hear you. Gentlemen of the Jury, will you step outside a moment?

(Jury leaves courtroom at 11:15 a.m.)

Mr. Hoddick: May it please the Court, I am not concerned with Mr. Soares questions or—

The Court: Just a minute. The Jury is now

(Testimony of William K. Wells.)

absent. The question before the Court is, what would you have done if he refused?

Mr. Hoddick: As I say, I am not concerned in this redirect examination with Mr. Soares' questions or Mr. Wells' answers. But it seems to me that the record should be made clear here, if it was the case—I don't know whether it was the case or not—as to whether the Defendant was arrested or was under arrest, actual or not, prior to the time that the first suspected substances were found.

The Court: Well, as it stands now, the evidence is simply that the search warrant was served on the Defendant in his living room at 803 Hausten Street; about 30 to 40 minutes thereafter he was placed under arrest by the witness. And from that there is no inference that he was previously under arrest.

Mr. Hoddick: Unless such an inference were to be drawn from the witness' statement that he required the Defendant [158] to go downstairs with him.

Mr. Soares: That has been cleared up. That's why we didn't object when Counsel asked the other question. What did you say, and then whether that was a command or a request is a matter of argument. But definitely what he might have done under different circumstances couldn't possibly be any evidence of any issue and certainly couldn't be redirect examination. Counsel has cleared that up now by saying that he is not concerned with any of the questions we asked on cross.

(Testimony of William K. Wells.)

Mr. Hoddick: It shows what the officer's state of mind was at the time that he asked Mr. Henry to go downstairs with him.

The Court: Mr. Reporter, will you go back to Mr. Soares' last question on cross-examination?

(The reporter read the question referred to.)

The Court: Well, the word "required" is the significant word there, in view of what you are driving at. You may certainly, in view of the direct examination, ask what he meant by "required." But as to asking him what he, the witness, would have done if the Defendant had refused to accompany him, I still don't see it.

Mr. Hoddick: Perhaps, your Honor, that was an awkward way of trying to resolve the meaning of the word "required" as used by the witness. I will withdraw that question and try [159] to frame another.

Mr. Soares: May I suggest to the Court that he has already cleared that up for almost the second or third time, the second or third question that Mr. Hoddick asked, and the question just before the one that we objected to cleared it up by his having said that he merely asked him to come down.

Mr. Hoddick: Is that your recollection of his answer?

Mr. Soares: Yes.

Mr. Hoddick: All right.

The Court: Well, all of that indicates that there is nothing significant to the word "required."

(Testimony of William K. Wells.)

Mr. Soares: No. We don't make any point of it.

Mr. Hoddick: Well, I didn't know what the defense was leading at, but I wanted to be sure that the record is straight on this point in the trial.

Mr. Soares: We may argue on the fact that the use of the word "required" doesn't denote, doesn't have any force at all.

The Court: It could. Well, anyway, you withdraw the question?

Mr. Hoddick: I withdraw the question, and no further questions.

The Court: And what?

Mr. Hoddick: No further questions.

The Court: We will call the Jury back. [160]

(Jury returns to courtroom at 11:20 a.m.)

The Court: Note the presence of the Jury—

Mr. Hoddick: No further questions.

The Court: —and the Defendant together with his attorneys.

Mr. Hoddick: No further questions of this witness.

The Court: All right. The witness is excused.

(Witness excused.)

Mr. Hoddick: Call Gilbert J. Carr, please.

## GILBERT J. CARR

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

## Direct Examination

The Court: What is your name?

The Witness: Gilbert J. Carr.

The Court: Age?

The Witness: 43.

The Court: Residence?

The Witness: 115 Kapaha, Kahala.

The Court: On this island?

The Witness: That's right.

The Court: And you are employed by—

The Witness: U. S. Customs chemist.

The Court: And you are a citizen of the United States?

The Witness: That's right. [161]

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

By Mr. Hoddick:

Q. Mr. Carr, where did you go to school?

A. University of Chicago.

Q. And what did you study there?

A. Chemistry, B. S. degree, majoring in chemistry.

Q. Did you specialize in any particular field of chemistry?

A. No, just majored in chemistry.

(Testimony of Gilbert J. Carr.)

Q. And what did you do after you finished with the University of Chicago?

A. Well, I have been employed in the laboratory of the Treasury Department since 1927. I was going to school off and on during that time.

Q. And while you were employed with the Treasury Department and in their laboratory, what type of work did you do?

A. Analyzed all types of narcotics, liquors, toilet preparations.

Q. Are there standard pharmaceutical tests for narcotics? A. Yes, there are.

Q. Are you familiar with those tests? [162]

A. Yes, I am.

Q. Are there particular tests for the determination or finding of cocaine? A. Yes, there is.

Q. Are you familiar with those tests?

A. Yes, I am.

Q. Are there particular tests for the finding and analysis of heroin? A. Yes, there is.

Q. Are you familiar with those tests?

A. Yes.

Q. And are there particular tests for the analysis and determination of marihuana?

A. Yes.

Q. Are you familiar with those tests?

A. Yes, I am.

Q. Have you used those tests?

A. I have, on many occasions.

Q. Over a course of how many years?

(Testimony of Gilbert J. Carr.)

A. Oh, about 15 years.

Q. How long have you been with the Customs laboratory in Hawaii, Mr. Carr?

A. I have been since January of this year, last year, January, 1949.

Q. Has Mr. Wells ever submitted substances to you for [163] analysis? A. Yes, he has.

Q. Did he do that on, did he submit substances to you for analysis on July 18th of this year?

A. My record will show. On July 18th Mr. Wells submitted one large envelope.

Q. And did you analyze those substances?

A. Yes, I did.

Q. Did you make a report of that analysis?

A. Yes, my report here shows.

Q. Don't read your report. Did you make a record? A. Yes, I did.

Q. A report? A. Yes, I did.

Q. And is that the type of report which is made whenever you analyze any substance?

A. That is routine in the laboratory.

Mr. Hoddick: Might I call Counsel to the bench for a minute?

The Court: Yes.

(Court and Counsel confer.)

Q. (By Mr. Hoddick): Now, I believe you testified, Mr. Carr, that on July 18, 1949, Mr. Wells brought certain substances to you for analysis? A. That's right.

Q. Did you put any identifying marks on the containers in which those substances were?

(Testimony of Gilbert J. Carr.)

A. There's a lab number and my initials on each sample.

Q. Showing you U. S. Exhibit No. 1 for identification purposes, I ask you if this is one of the articles which Mr. Wells brought to you on July 18, 1949? A. Yes, it is.

Q. And how do you know?

A. This is my initials and date right here.

Q. Does the laboratory number appear on the article itself?

A. No, that is probably on the other envelope. I have here—removed so many capsules from here. That should be in another envelope.

Q. That is in your handwriting?

A. Yes, that's right.

Q. Now, did you analyze the contents of this Exhibit No. 1 for identification purposes?

A. Yes, I did.

Q. How did you make your analysis?

A. I removed from that container 10 capsules taken at random, and of those 10 I analyzed a certain quantity.

Q. And what type of tests did you make on the 10?

A. Qualitative tests and quantitative tests. And it [165] showed the presence of—can I have the envelopes, please? I can identify them much better.

Q. I will get these in properly. What did you do with the 10 capsules or what was left of them

(Testimony of Gilbert J. Carr.)

after you had performed the tests which you took from U. S. Exhibit No. 1?

A. They were placed in a laboratory envelope and sealed.

A. And did you put your identifying marks on that? A. Yes, I did.

Q. I show you a Treasury Department envelope which on the lefthand corner has Exhibit 4 marked on it, and ask you if that is the envelope in which you sealed the residue? A. That's correct.

Q. Now, from your analysis of those capsules which you took from the Ovaltine bottle, what did you determine their contents to be?

A. These contained heroin-hydrochloride.

Q. And you say you made both a quantitative and qualitative test? A. That is correct.

Q. What did your quantitative test reveal?

A. 86.7 per cent anhydrous heroin; that is, without water.

Q. And what is contained in that envelope?

A. This is what was remaining after analysis.

Q. I show you U. S. Exhibit No. 3 for identification [166] purposes and ask you if this is one of the articles which was delivered to you by Mr. Wells on July 18, 1949? A. Yes, it is.

Q. And did you analyze the contents of that article?

A. Yes, I removed a certain quantity also from this container.

(Testimony of Gilbert J. Carr.)

The Court: Excuse me. What is the mark on that—three or five for identification?

Mr. Hoddick: I beg your pardon. That is U. S. Exhibit No. 5 for identification purposes.

Q. You removed a certain quantity for analysis? A. Yes, I did.

Q. And what was the result of your analysis?

A. That analysis showed this contained, this container contains—this contained cocaine hydrochloride.

Q. Did you make both a quantitative and qualitative analyses?

A. Yes, I did. This contained 86.1 per cent of anhydrous cocaine.

Q. And what did you do with the part that you had removed for purposes of testing?

A. That was placed in an envelope and sealed and returned to Mr. Wells.

Q. And is this the envelope in which you placed the residue? [167] A. Yes, it is.

Q. I show you U. S. Exhibit No. 7 for identification purposes and ask you if this is one of the articles which Mr. Wells gave you for analysis on July 18, 1949?

A. No record on here. But my record here shows "Taken from a paper bag, 29.6 grains."

Q. What did your analysis of the 29.6 grains which you took from the paper bag reveal?

A. Marihuana.

Mr. Landau: I object to this, if the Court

(Testimony of Gilbert J. Carr.)

pleases, unless we have some definite link-up at the moment. That paper bag—

Mr. Hoddick: Your Honor, I suggest that Mr. Wells has testified that he gave that paper bag to Mr. Carr on July 18th.

The Court: That is right.

Mr. Hoddick: And his record shows that he received a paper bag from which he took 86.6 and Mr. Wells also testified that he received the paper bag from Mr. Carr on July 22nd, and that is the same paper bag.

Mr. Landau: That may be so, but that is not necessarily the bag that Mr. Carr himself tested.

The Court: There is a gap there. The testimony is, as you said, that Mr. Wells testified having given this man a paper bag on a certain date for purposes of chemical analysis, [168] but whether this is that bag and the contents that he tested, we don't know.

Mr. Hoddick: Could I have a short recess, your Honor, maybe a couple of minutes of the Court's time?

The Court: Look at that paper bag again. Aren't your initials on it?

The Witness: I usually do that by habit. I can't see them.

The Court: Look in the folds, on the bottom of it.

The Witness: No.

Q. (By Mr. Hoddick): Mr. Carr, on the day

(Testimony of Gilbert J. Carr.)

that you received these articles that you have testified to from Mr. Wells, did you receive more than one paper bag?

A. The records only show one paper bag.

Q. From your recollection did you receive more than one paper bag?

A. I wouldn't remember.

Q. Those records are made at the time—

A. At the time the samples are received.

Q. If that record shows that you made an analysis of the contents of a paper bag received at that time, it necessarily is the paper bag which you received from Mr. Wells? A. That's correct.

Mr. Landau: I object to that, if the Court please. [169] That is speculative.

The Court: How do you know somebody else didn't give him a paper bag that day having something in it for testing? Mr. Witness, do you know whether that is the paper bag that you received from Mr. Wells and from which you took something and tested it? Do you know that positively?

The Witness: Yes, I do.

Q. (By Mr. Hoddick): How do you know that?

A. I remember Mr. Wells bringing in this particular package.

Q. You remember what?

A. I remember Mr. Wells bringing in this particular package. This is one of those instances when I do remember.

(Testimony of Gilbert J. Carr.)

Q. And you took from that package a certain quantity? A. A certain quantity.

Q. For analysis? A. That's correct.

Q. And what did that analysis of the quantity which you took from the paper bag reveal?

A. It contained marihuana.

Q. You have tested many times for marihuana before? A. Yes, I have.

Q. What did you do with the part which you removed from the paper bag for purposes of test?

A. I placed that in one of my envelopes and sealed it and returned it to Mr. Wells.

Q. Do you have that envelope there now which I just handed you? A. Yes, I have.

Q. I show you U. S. Exhibit No. 8 for identification purposes and ask you if that was one of the articles given to you by Mr. Wells on July 18, 1949, for purposes of analysis?

A. Well, this is my envelope containing three cigarettes which I took from a lot of six. He had six. I took three and placed it in this envelope after analysis.

Q. Do you remember what the six were contained in?

A. No, I just have here "taken from a lot of six."

Q. And are these three cigarettes that are in here, were they examined by you?

A. Yes, they were.

Q. And how can you tell that?

(Testimony of Gilbert J. Carr.)

A. This is—my initials appear on each cigarette.

Q. And what did you find those cigarettes contained?

A. Cigarettes contained marihuana.

Q. Will you open up U. S. Exhibit No. 9 for identification purposes, Mr. Carr, and tell me whether Mr. Wells gave you those cigarettes for analysis on July 18, 1949?

A. Yes, this is the other three. My initials also appear on these three. [171]

Q. And what did you find that these three cigarettes contained?

A. I didn't test those. They are the three remaining.

Q. The other three which were in the lot of six?

A. That's right.

Q. How did you select the three which you did test?

A. Just took three at random.

Q. Now, Mr. Carr, from the time that you received the six cigarettes which are contained in U. S. Exhibit No. 8 and 9, U. S. Exhibit No. 1 for identification purposes, and U. S. Exhibit No. 5 for identification purposes, and U. S. Exhibit No. 7 for identification purposes, until you returned those articles to Mr. Wells, was there any change in the condition of their contents other than the fact that you removed a certain portion from the Ovaltine bottle and the smaller bottle?

(Testimony of Gilbert J. Carr.)

A. No, there wasn't.

Mr. Hoddick: No further questions.

Mr. Landau: Would it be possible, if the Court pleases, to start my cross-examination of this witness at two?

Mr. Hoddick: I would like at this time, before you start your cross-examination—something I neglected to do—

Mr. Landau: If it takes no more time than 12.

Mr. Hoddick: —to offer in evidence U. S. Exhibit No. [172] 9 for identification purposes and U. S. Exhibit 8 for identification purposes, U. S. Exhibit No. 7 for identification purposes, U. S. 5 for identification purposes and U. S. 1 for identification purposes.

Mr. Landau: I would like to object, if the Court pleases, to the offer until after the cross-examination, which is one of the reasons why—the things that I had in mind—I had asked the Court to be permitted to start my cross at two o'clock.

The Court: I haven't any objection to that. The thing that is confusing me is that I don't remember whether there is one thing marked for identification that hasn't—

Mr. Hoddick: Mr. Carr made no examination of it and it will not be offered in evidence. That is U. S. Exhibit No. 6.

The Court: Didn't Mr. Wells testify having given it to him for examination?

Mr. Hoddick: That is correct.

(Testimony of Gilbert J. Carr.)

Mr. Landau: That's right. I want to be able to check my notes on some of these matters, if the Court pleases.

The Court: I haven't any objection to your having until two o'clock. I am just trying to see whether my memory was serving me correctly or not. All right, if you are through with this witness—

Mr. Hoddick: I am, your Honor.

The Court: —on direct examination, I will grant your [173] request that we adjourn now for the noon recess, and you may begin your cross-examination of this witness at two.

Mr. Landau: Very well.

(The Court recessed at 11:50 a.m.) [174]

#### Afternoon Session

The Court: Back to case No. 10,253. The Jury is present as is the Defendant together with his attorneys, and you may continue.

Mr. Hoddick: May it please the Court, just before the Court recessed I had felt I could finish my direct examination of Mr. Carr. I would like to have leave of Court to continue that direct examination for a few further questions.

Mr. Landau: No objection.

The Court: The nature of which is?

Mr. Hoddick: In order to establish—

The Court: Oh, you say no objection?

Mr. Landau: No objection.

(Testimony of Gilbert J. Carr.)

The Court: All right.

Direct Examination  
(Continued)

By Mr. Hoddick:

Q. Mr. Carr, at the time that Mr. Wells brought to you these various articles on July 18, 1949, did he bring to you this box which is marked U. S. Exhibit No. 6 for identificaton purposes?

A. Yes, he did.

Q. And did you return that to Mr. Wells at a later date? A. Yes, with the other packages.

Q. And during the time that this U. S. Exhibit No. 6 [174a] for identification purposes was in your possession, was there any change in the condition of its contents? A. No, no change.

Q. How long does it take, Mr. Carr, to perform a test or to examine a substance to determine whether it is marihuana or not?

A. I can make one microscopic examination in just a few minutes.

Q. I should like to ask you to examine the contents or a sample of the contents of that box and give to the Court and to the Jury the results of that analysis.

(Witness opens a wooden box and produces a microscope.)

A. That contains marihuana. That one cigarette contains marihuana.

(Testimony of Gilbert J. Carr.)

Q. Did you just examine the contents of one cigarette? A. Yes, just one.

Q. Will you examine one more?

A. I took out three. I think three should be—  
(Examining cigarette through microscope)—and that contains marihuana.

Q. That is another sample from one of the cigarettes contained in Exhibit 6?

A. That's right. And the third one contains marihuana.

Q. Mr. Carr, are you familiar with the narcotics tax paid stamps that are— [175]

A. Yes, I am.

Q. Mr. Carr, did any of those articles which Mr. Wells brought in to you on July 18, 1949, bear such narcotics tax paid stamps?

A. No, it didn't. It had no stamps.

Mr. Hoddick: No further questions.

The Court: Cross-examination?

Mr. Landau: In view of the reopening of the direct examination, if the Court pleases, I don't think there is any reason for cross-examination. I just wanted to get that straightened out about these other items. That's all I had in mind under cross.

Mr. Hoddick: At this time, your Honor, I should like to renew my offer in evidence of U. S. Exhibit No. 1 for identification purposes, U. S. Exhibit No. 5 for identification purposes, No. 6, No. 7, No. 8 and 9, all for identification purposes.

(Testimony of Gilbert J. Carr.)

Mr. Landau: If the Court pleases, we object to the introduction of the items in evidence on the grounds that they have not been sufficiently identified and connected up with the Defendant. They don't tend to prove or disprove the matters herein.

The Court: Just a minute, Mr. Landau. Mr. Clerk, give the witness three separate envelopes to put the cigarettes which you have tested into them and seal them and initial [176] them. Unless you have your pen, you can use mine. (Witness puts cigarette contents in three separate envelopes, seals and initials them.)

Mr. Landau: I had completed my objection.

The Court: Do you want to be heard in argument?

Mr. Landau: We will submit it.

The Court: Overruled.

Mr. Landau: May we have an exception?

The Court: You may have an exception. The various matters offered in evidence now may be marked as evidence, and, Mr. Witness, give to the clerk the three envelopes that you have used to put the remnants of your test in which you have sealed and initialed. I think they had better accompany that box, either that or give it back to Mr. Wells.

Mr. Hoddick: We have no objections.

The Court: We are going to get lost in our records if they aren't in or out—

Mr. Hoddick: I would suggest that all envelopes be returned to Mr. Wells.

(Testimony of Gilbert J. Carr.)

The Court: Well, now, let's see. Those are the three the witness just used. There were some others that he had on the witness stand.

The Witness: No, I put those back in the box.

Mr. Hoddick: He has already returned those.

The Court: To Mr. Wells? [177]

Mr. Hoddick: That is right.

The Court: All right. Unless someone wishes to have them accompany the things that have been received in evidence, they may now, those three envelopes containing the remnants of the test made in Court, may now be returned to Mr. Wells. All right, Mr. Wells, you may take them.

Mr. Soares: That is in his official capacity?

The Court: Oh, yes, definitely. Now we will get to the marking of these things. Mr. Clerk, you call out the letters that you are giving.

The Clerk: No. 1 is U. S. Exhibit "D" in evidence.

The Court: "B"?

The Clerk: "D."

(U. S. Exhibit "D" was received in evidence.)

The Clerk: Number—

The Court: Wait a minute. U. S. Exhibit "D" was—

The Clerk: One for identification.

The Court: That was the large bottle?

The Clerk: The large bottle.

(Testimony of Gilbert J. Carr.)

The Court: All right.

The Clerk: No. 5 for identification is now being admitted as U. S. Exhibit "E," the small bottle.

(U. S. Exhibit "E" was received in evidence.)

Mr. Hoddick: That was "C"?

The Clerk: "E," "D" and "E." [178]

Mr. Hoddick: Thank you.

The Clerk: No. 7 for identification is U. S. Exhibit "F." That is the brown paper bag.

The Court: All right.

(U. S. Exhibit "F" was received in evidence.)

The Clerk: No. 8 for identification is U. S. Exhibit "G."

(U. S. Exhibit "G" was received in evidence.)

The Clerk: An envelope containing three cigarettes, No. 9 for identification is U. S. Exhibit "H."

(U. S. Exhibit "H" was received in evidence.)

The Clerk: Three cigarettes wrapped in cellophane paper

Mr. Hoddick: And, Mr. Thompson, U. S. Exhibit No. 6 is also offered in evidence.

The Clerk: As U. S. Exhibit "I."

(Testimony of Gilbert J. Carr.)

(U. S. Exhibit "I" was received in evidence.)

The Court: That is what?

The Clerk: No. 6 for identification.

The Court: All right. Next witness.

Mr. Hoddick: Mr. H. A. Patterson.

### HOWARD A. PATTERSON

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

#### Direct Examination

The Court: Will you please state your name?

The Witness: Howard A. Patterson.

The Court: Age?

The Witness: 33.

The Court: Residence?

The Witness: 1565-C Pensacola.

The Court: Honolulu?

The Witness: Honolulu.

The Court: Occupation?

The Witness: Zone deputy collector of Internal Revenue.

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

Q. (By Mr. Hoddick): Mr. Patterson, will

(Testimony of Howard A. Patterson.)

you keep your voice raised? A. Yes, sir.

Q. Where did you say you were employed?

A. As a zone deputy collector with the Internal Revenue service.

Q. How long have you been with the Bureau of Internal Revenue?

A. Since December 2, 1948, sir.

Q. And you are with the collector's office here in Hawaii? [180]

A. Yes, with the field division.

Q. And have been in that office since that date?

A. Yes, sir.

Q. Mr. Patterson, are you familiar with the marihuana order forms which are mentioned in Section 2593 Title 26 U. S. Code?

A. Yes, sir, I am.

Q. Did you at any time make demand on the Defendant for production of such order forms covering the marihuana which was picked up at 803 Hausten Street on July 16, 1949?

A. Yes, sir, I did.

Q. And where did you make such demand?

A. On the date of September 27th at 8:20 p.m.

Q. Where did you make such?

A. In the premises of Helen's Sweets Shop.

Q. And did he produce those order forms at that time? A. No, sir, he did not.

Q. Did you give him a time within which he should produce them?

A. I gave him until the close of business September 30th to produce it in the field office to me.

(Testimony of Howard A. Patterson.)

Q. And did he produce them?

A. No, sir, he did not.

Q. Now, are you familiar with the Defendant of whom I have been speaking? [181]

A. I have seen him.

Q. And will you point him out at this time?

A. Over there, sir.

The Court: Where?

Q. Will you designate where he is sitting?

A. On the end of the table.

The Court: Which end?

A. My right, sir.

Mr. Hoddick: May the record show that he has identified the Defendant, Mr. Winston Churchill Henry?

The Court: Yes. Excuse me. Let's go back. What was the date on which you made the demand on him?

The Witness: September 27th, sir.

The Court: 1949?

The Witness: Yes.

The Court: You gave him until the close of business of what?

The Witness: September 30th.

Mr. Hoddick: And this all took place in 1949?

The Witness: Yes.

Mr. Hoddick: No further questions.

The Court: Excuse me. Did he produce an order form?

The Witness: No, sir, he did not.

The Court: Cross-examination?

(Testimony of Howard A. Patterson.)

Mr. Landau: If the Court will give me just a moment, [182] please.

The Court: Yes.

### Cross-Examination

By Mr. Landau:

Q. Do you know, Mr. Patterson, whether or not at the time you made the demand on September 27th that the Defendant had already been indicted for this offense? A. No, sir, I did not.

Q. Do you now know that at the time you made the demand he had already been indicted?

A. Yes, sir.

Q. Who was with you at the time that you made the demand, Mr. Patterson?

A. The demand was made in the presence of Mr. Wells.

Q. And at the request of Mr. Wells?

A. At the request of Mr. Wells.

Mr. Landau: That's all.

The Court: Redirect?

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Hoddick: Sergeant Theodore Kinney.

### THEODORE KINNEY

a witness in behalf of the Plaintiff, being duly sworn, testified as follows: [183]

(Testimony of Theodore Kinney.)

The Court: Will you please state your name?

The Witness: Theodore P. Kinney.

The Court: Age?

The Witness: 40 years old.

The Court: Residence?

The Witness: 3259-A 18th Street.

The Court: Honolulu?

The Witness: Honolulu, T. H.

The Court: Occupation?

The Witness: Police officer, City and County of Honolulu.

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Only?

The Witness: Beg your pardon?

The Court: Only?

The Witness: Only.

The Court: Take the witness.

#### Direct Examination

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Mr. Kinney?

A. Eleven years, sir.

Q. And with what branch of the department were you serving during July of 1949?

A. In the vice division. [184]

Q. At that time how long have you been with the vice division? A. Exactly one year.

(Testimony of Theodore Kinney.)

Q. Did you participate in a search of the premises of the rear house at 803 Hausten Street on July 16, 1949? A. Yes, I did.

Q. After that search was concluded did you have occasion to speak with the Defendant, Winston Churchill Henry? A. Yes, sir.

Q. Can you identify the Defendant?

A. Yes, I can.

Q. Will you point him out, please?

A. He is over there in the corner right next to Mr. Soares.

Q. On Mr. Soares' left? A. Yes, sir.

Mr. Hoddick: May the record show that the witness has identified the Defendant, your Honor?

The Court: Yes.

Q. And where did you have this conversation with the Defendant?

A. At the vice room in the Honolulu Police Department.

Q. And approximately what time?

A. Approximately about 4:45 in the afternoon.

Q. That was on July 16, 1949? [185]

A. Yes, sir.

Q. At that time did the Defendant say anything to you concerning the various articles which were found at 803 Hausten Street? A. Yes.

Q. What did he say?

A. He said that everything that happened out at the premises at 803 Hausten Street "I am responsible for." And everything that was found on the premises.

(Testimony of Theodore Kinney.)

Q. He said, "I am responsible for everything that was found on the premises"?

Mr. Soares: We object to that as leading and suggestive.

The Court: Sustained.

Q. (By Mr. Hoddick): Insofar as you can, Officer Kinney, give the Defendant's exact words.

A. "Everything that was found on the premises at 803 Hausten Street I am responsible for."

Q. In your presence did the Defendant at any time say anything about the—withdraw that. In your presence did the Defendant at any time on that day state where he was living?

Mr. Soares: Objected to as leading and suggestive. Let the witness testify as to the conversation

The Court: Sustained. [186]

Q. (By Mr. Hoddick): Will you relate to the Court and Jury, Mr. Kinney, what else you heard the Defendant say down at the police station on July 16, 1949?

A. The Defendant stated, said that he was living at 803 Hausten Street.

Q. And when did that happen?

A. That was about two months before this.

Q. No, no, when did he state that?

A. At the same time we talked at the police vice squad room at the police station.

Q. Did he say how long he had been living there?

A. About two months prior to the arrest.

Mr. Hoddick: No further questions.

The Court: Cross-examination?

(Testimony of Theodore Kinney.)

Cross-Examination

By Mr. Landau:

Q. Mr. Kinney, you testified in the District Court of Honolulu some time ago with reference to these same premises, did you not?

A. Yes, sir.

Q. And at that time I was the attorney representing Mr. Henry? A. Yes.

Q. Right. And the question of the residence came into the—and the question of the residence came into question in [187] that hearing, did it not, Mr. Kinney? A. I believe it did.

Q. And at that time did you say anything about the fact that the Defendant had told you that he was living at 803 Hausten Street?

A. I don't recall.

Q. Isn't it a fact—

A. The question wasn't apparently put to me at that time.

Q. I see. Isn't it a fact that you testified in that case that the Defendant resided at 803 Hausten Street because you had seen the black Packard there on three occasions in the two weeks prior to July 16th?

A. That question up there, you asked me how long we had been casing that place.

Q. Just a minute. Answer my question. Didn't you testify down there that this was the Defendant's residence because you had seen this black Packard

(Testimony of Theodore Kinney.)

in front of the premises on three different occasions for a period of two weeks prior to July 16th? You remember my asking that question and your answer?

A. I remember something, a question similar to that.

Q. And do you remember, Mr. Kinney, my asking you whether you went by there every day and you testified that you went by most every day during your tour of duty, just drove [188] by that house?

A. I said occasionally I did.

Q. And during these occasions that you went by you noticed that black Packard there three times?

A. About three times.

Q. And it was on that statement which you gave, which you based your statement, that the Defendant resided there?

A. Yes. No. But at the station I talked to Mr. Henry he—

Q. Please, Mr. Kinney, answer my question.

The Court: Let him answer the question.

Mr. Landau: May the question be read to him?

(The reporter read the last question.)

The Court: Referring to the statement in the District Court?

Mr. Landau: Yes.

A. Well, I based my opinion that he resided there also by observations.

Q. That is, you saw the car there?

A. Yes, yes, I saw the car.

(Testimony of Theodore Kinney.)

Q. And that is all you testified to at that hearing with reference to the residence? You didn't once mention anything about a statement which the Defendant made to you, isn't that correct?

A. Not at the station. The question wasn't put up [189] to me.

Q. Maybe you don't understand me. During this hearing in the District Court—you know which one I am referring to now?—did you once make mention in your testimony that you were basing your opinion that the Defendant lived at 803 Hausten Street on a statement which he had made to you?

A. No, I didn't say, I didn't make that statement.

Q. And you remember I was questioning you at considerable length on that particular matter?

A. Yes.

Q. And you didn't mention that once down there? A. Because you didn't ask me.

Q. Because I didn't ask you? I did ask you how you knew that the Defendant lived there and you gave me your answer, didn't you, Mr. Kinney?

A. Yes, I gave you an answer.

Q. You gave me an answer, and that answer was that you had seen the Packard there three times in a period of two weeks?

A. Yes, about three times.

Q. And in answer to the question which I put to you you did not say that the Defendant had told you that he was living there?

(Testimony of Theodore Kinney.)

Mr. Hoddick: Is that a question, Mr. Landau?

Mr. Landau: It is a question. [190]

A. You didn't put a question like that across to me.

Q. Didn't you just a minute ago admit when I asked you the question as to how you knew that the Defendant lived at 803 Hausten Street and you said I did ask you that question?

A. I guess—well, the way how you phrased that other question is a little different. That's why my answer is different.

Q. Well, at any rate, to sum it up, the only answer you gave to my question how you knew that the Defendant lived at 803 Hausten Street was that you had seen the car there three times over a period of two weeks prior to July 16, 1949? A. Yes.

Q. And at that time you did not either answer a question or volunteer the question that the Defendant had told you that he had lived there?

A. No, I didn't volunteer that information then.

Q. And you didn't know, of course, that when I was examining you down there I wanted all the information about how you knew that the Defendant lived at 803 Hausten Street?

A. Apparently you wanted all the answers.

Q. Yes, I wanted an answer, didn't I, Mr. Kinney, isn't that correct? A. Yes.

Q. And I wanted an honest answer, a fair answer, didn't [191] I, Mr. Kinney? A. Yes.

Q. I didn't get it, did I?

(Testimony of Theodore Kinney.)

A. You didn't ask that question, that's why.

Q. Are we playing a game when I cross-examine you, Mr. Kinney?

A. No, sir. I don't think so.

Mr. Hoddick: I object to that as argumentative. Mr. Kinney, when I stand up don't answer any questions until we thrash out whatever my objection is.

Q. (By Mr. Landau): Now, Mr. Kinney, you knew at that time that Helen Thomas was in custody—

The Court: What time are you talking about?

Mr. Landau: About 4:45 p.m. of July 16th

Mr. Hoddick: Objection, your Honor. I don't think this falls within the proper range of cross-examination. It is immaterial to the issues in this case.

The Court: Sustained.

Mr. Landau: I think it is very material, if the Court pleases. I am sorry I didn't get my rebuttal to the argument soon enough. I'd like to be permitted before your Honor rules on it.

The Court: All right.

Mr. Landau: Rather than have the Jury excused, may we [192] be permitted to approach the bench and discuss it?

The Court: All right.

(Counsel and Court confer.)

The Court: The ruling is cancelled. You may proceed.

(Testimony of Theodore Kinney.)

A. Yes, he was in custody at that time.

Q. And Henry the Defendant, knew that she was in custody? A. Yes.

Mr. Hoddick: Objection. This witness can't possibly know what Henry knew at that time.

The Court: He said he did.

Mr. Hoddick: Has he answered the question? I didn't hear it.

The Court: Yes, he did.

Mr. Hoddick: Withdraw the objection.

The Court: So I now understand both the witness and the Defendant knew at the time in question that Mrs. Thomas was then in custody.

Q. Now, as a matter of fact, Mr. Kinney, this conversation that you had down there with Mr. Henry was in the course of your investigation concerning the possession of a gun?

A. Two guns.

Q. All right, two guns. But that is what your investigation concerned itself with, isn't that right?

A. Yes, sir.

Q. And you knew that when Mr. Henry was answering your questions he was answering the questions with reference to the subject matter of your investigation?

A. Well, he was answering questions in general. The questions I was putting across to him was in general. I mean the whole thing that happened out at Hausten Street.

Q. With reference to the items which you were investigating, isn't that correct, Mr. Kinney?

(Testimony of Theodore Kinney.)

A. Yes, I was talking about guns, but—

Q. And you knew he was talking—

Mr. Hoddick: Let him finish.

The Court: Finish your answer.

A. —but this statement he had given to me was given voluntarily by him.

Mr. Landau: O.K. No further questions.

Mr. Hoddick: No further questions.

(Witness excused.)

Mr. Hoddick: Your Honor, at this time the Government rests in this case.

The Court: Very well.

Mr. Landau: If the Court please, we are somewhat taken by surprise that the Government is resting at this time. May we have a short recess?

The Court: Yes. [194]

(A short recess was taken at 2:48 p.m.)

The Court: Note the presence of the Jury and of the Defendant together with his attorneys.

Mr. Hoddick: May it please the Court, I should like to recall Mr. Carr to the stand for about two or three more questions. I understand that the Defendants have no objections. I also must unfortunately advise the Court that Mr. Carr has already departed for the far side of the island and I therefore respectfully ask for a continuance until Monday morning.

Mr. Landau: We have no objection, if the Court pleases.

(Testimony of Theodore Kinney.)

The Court: Well, there is another witness you were going to recall by the name of Shaffer.

Mr. Hoddick: Mr. Shaffer will not be recalled.

The Court: Very well. With the understanding that you are going to rest after you recall Carr for one or two questions and thereafter you have prepared and are ready to present motions that you have in mind.

Mr. Landau: Yes, your Honor.

The Court: We will at this time adjourn until Monday morning at ten. And as we do so, I recall to mind with the week-end coming up the admonition which I have several times given the Jury during the course of this trial, which I am sure they remember the specific details of. And I will not [195] repeat them other than to say, do not discuss this case, period, or listen to anyone else discussing it, period, or read of anyone's discussion of it, period. All right.

(The Court adjourned at 3:10 p.m.) [196]

January 9, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, for further trial.

The Court: Note the presence of the jury and of the Defendant, together with his attorneys. Are the parties ready?

Mr. Landau: Yes, if the Court pleases. If the Court pleases, before any further testimony is taken,

(Testimony of Theodore Kinney.)

the defense in this case moves for a mistrial on the grounds of the newspaper reports which were in yesterday afternoon's and this morning's *Advertiser*. If the Court please, I do not have them available, but I believe the Court has them and is familiar with them, and with the Court's permission may I request that the articles which your Honor has be admitted into evidence for the purposes of the argument, for the record.

The Court: I do not have them handy, but I can supply them. You refer to the *Advertiser*, do you not?

Mr. Landau: Yes, yesterday morning, Sunday, the 8th of January, and this morning. This is yesterday's, if the Court please. May I introduce in evidence this morning's.

The Court: Yes, the one is the *Star Bulletin*. I have it for a different purpose.

Gentlemen of the Jury, did any of you read in Sunday's and this morning's *Honolulu Advertiser* the articles that Mr. [197] Landau is referring to? If so, will you please raise your hand.

Mr. Wells: Your Honor, those are the articles that dealt generally—

The Court: Yes, Mr. Wells.

Mr. Wells: Dealt generally with the question of narcotics in *Honolulu*?

The Court: Yes. Mr. Mosher, you raised your hand.

Juror Mosher: Yes, sir, I read the one in this morning's paper, sir, not yesterday morning's.

(Testimony of Theodore Kinney.)

The Court: Do you wish to ask Mr. Mosher any questions

Mr. Landau: No, your Honor.

The Court: Do you?

Mr. Hoddick: No, your Honor. I would like to examine this morning's article.

The Court: You realize, do you not, Mr. Mosher, and gentlemen of the jury, that these articles, which I do not want you to read, should there be any additional ones during the course of this trial, have no relevancy to the case which you gentlemen under your oaths are trying on the evidence which is presented here in court and in court alone.

You realize that, Mr. Mosher?

Juror Mosher: I didn't hear the statement. [198]

The Court: You realize that these articles, one of which, namely, this morning's, you say you have read and any others that may be published during the course of this trial, which I do not want any of you to read, and which, if I had known they were coming, I would have covered by my admonition and instruction, these articles have no relevancy to the case which you gentlemen are trying upon your oaths as jurors and trying only and solely and exclusively upon the evidence which is introduced here in court before your eyes and in your hearing. You realize that?

Juror Moser: Yes, sir.

The Court: As a result of reading this morning's article in the Honolulu Advertiser, Mr. Mosher, have

you been prejudiced one way or another to the point where you cannot now give the defendant a fair trial and the Government a fair trial?

Juror Mosher: No, sir.

The Court: Well, do you want to say something?

Mr. Hoddick: I was just going to submit the matter and point out to your Honor that this morning's article contains no prejudicial remarks.

Mr. Landau: That is correct. This morning's didn't, but yesterday's did.

The Court: Yes. Well, to repeat myself, and this is to continue, as is my other instruction to you, I add to [199] that general instruction that I do not want you to read anything currently published of the nature of the series that is now being published in the Honolulu Advertiser on the subject of narcotics during the course of this trial. You can pile them up and read them after the trial, but not during the trial. I am satisfied that there is no basis for a motion for a mistrial on the grounds stated, and it is therefore denied.

Mr. Landau: I didn't hear you.

The Court: I am satisfied that there is no basis for the motion for a mistrial and therefore it is denied.

Mr. Landau: May we have an exception.

The Court: Certainly. The same goes without saying that should any other newspaper undertake such a series of articles, or article, that this instruction is broad enough to cover any publication, whether it be in the form of newspaper or magazine

or radio, or anything of the sort, or lecture. All right.

Mr. Hoddick, I believe you wish to recall Mr. Carr for one or two questions.

Mr. Hoddick: That is correct, your Honor.

### GILBERT J. CARR

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows: [200]

The Court: Mr. Carr, you are the same Mr. Gilbert J. Carr who heretofore has testified in this case?

The Witness: That's right.

The Court: I remind you that you are still under oath.

You may take the witness.

### Direct Examination (Continued)

By Mr. Hoddick:

Q. Mr. Carr, what is heroin?

A. Heroin is diacetyl morphine hydrochloride, which is derived from morphine, which is in turn derived from opium.

Q. And what is cocaine?

A. Cocaine is derived from the leaves of the cocoa plant.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Mr. Landau: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Hoddick: The Government will now rest its case, your Honor.

Mr. Landau: If the Court pleases, in accordance with the suggestion made last week, I have a number of motions to make, and since the motions must be made in the presence of the jury, but argued out of the presence, may I make all [201] the motions at the present time in the presence of the jury so the jury won't have to keep coming back for each motion?

The Court: Yes, if you will go slowly so I can jot them down, too.

Mr. Landau: The defense now moves, if the Court pleases, to strike all the testimony of Government witnesses relating to acts of, and conversations with, the defendant that are in any way incriminatory which occurred after the service of the search warrant at 803 Hausten Street, for the reason that at the time of the search and investigation thereafter the defendant was then under an illegal arrest, and hence anything that was said by him or done by him is presumed to have been done or said under duress and not free and voluntary.

Move to strike the testimony of Officer Kinney, if the Court pleases, especially that portion of his testimony in which he testified about a conversation between himself and the defendant at the vice squad room on July 16, 1949, at or about 4:45 p.m., wherein the defendant is alleged to have stated that

he was responsible for everything at 803 Hausten Street, for the reason that, as Mr. Kinney testified, he was then conducting an investigation concerning certain guns, and the questions put to the defendant and the defendant's answers thereto related specifically to these guns and hence could have no possible bearing on, or admissible as an admission [202] in this case, or to any matter which was not then under investigation by Mr. Kinney.

We move to strike the testimony of Mr. H. A. Patterson, if the Court pleases, in which he testified concerning the making of a demand of the defendant for the production of certain forms on September 27, 1949, and giving him until September 30 to produce those forms, for the reason that the demand was made after the indictment was returned by the grand jury; and, even though Mr. Patterson may himself not have known that an indictment had previously been brought, the demand was made in the presence and at the request of Mr. Wells, who knew that the indictment had, in fact, been returned; for the further reason that at the trial of the case the only evidence of nonpayment of the tax was Mr. Patterson's testimony, which was not and could not have been available to the grand jury, and hence at the time of the indictment there was, in fact, no evidence of any violation of the law; for the further reason that the time given by the witness to the defendant to produce the forms was not reasonable under the circumstances; and for the further reason that the demand having come after the

indictment was in effect required the defendant to give testimony against himself; and for the further reason that there is no evidence that Mr. Patterson in any way informed the defendant as to the law and the requirement that such forms be produced or the effect of such failure. [203]

We move for a directed verdict now, if the Court pleases, as to both counts, for the reason that there is absolutely no direct evidence as to the violation of the defendant, that the only evidence which the Government has tried to produce, as was admitted by the Government during the argument on the motion for a bill of particulars, was the presumptions arising from possession, and the Government has failed completely to show that on July 16, 1949, the defendant was found in possession of any of the articles mentioned in either count of the indictment, for the reason that possession, to be incriminatory, must be personal and exclusive, neither of which has been shown by the Government.

We make a specific motion for a directed verdict as to Count 1, if the Court pleases, in addition to reasons given on the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 1 for the reason that there is a variance between the indictment and the proof, for the reason that there is no evidence that defendant was found in possession of any of the articles mentioned in said count, nor that the said articles did not come from an original stamped package, for the reason that the evidence is silent as to any purchase by the

defendant of these articles as is charged in the indictment, and is silent as to any dealings therein; that the so-called presumption of the statute is not a presumption by a rule of evidence shifting [204] the burden of going forward. It is not evidence of an act which the jury must find beyond all reasonable doubt, to wit, that the defendant did, in fact, purchase these articles on or about July 16, 1949. And for the further reason that the evidence, giving the Government every possible and conceivable benefit, at best raises two theories, one consistent with innocence, the other with guilt, and under the law the theory consistent with innocence must be accepted by the Court.

We move for a directed verdict as to Count 2, if the Court pleases, in addition to the grounds given as to the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 2 for the reason that there is no direct evidence that the defendant was a transferee or required to pay the tax, nor is there any evidence that the defendant was found in possession of any of the articles mentioned therein, that there is no proper evidence as to the demand by the Collector to produce the order forms; and, of course, if my motion to strike Mr. Patterson's testimony is granted, there is no evidence at all of the demand and therefore no presumption whatsoever; that the presumption, if any, is not evidence of a fact, which the jury must find beyond all reasonable doubt, to wit, that the defendant was in fact a transferee and required to pay the tax.

Giving the Government's evidence every possible benefit, the evidence at best raises two theories, one consistent with [205] innocence, the other with guilt, and under the law the theory consistent with innocence must be accepted by the Court.

The Court: Are you prepared to argue these at this time?

Mr. Landau: Yes, your Honor.

The Court: Very well. To hear argument on these motions I will excuse the jury, but before I do so, have you any thought as to how long you will need to present your argument? In other words, should I excuse the jury until 2 o'clock?

Mr. Landau: I think it might be more convenient for the jury to do so, than, say, to come back at 11:30 or quarter to 12 and stay maybe twelve to fifteen minutes.

The Court: What do you think?

Mr. Hoddick: I think that is the proper course to follow, your Honor.

The Court: That strikes me as being sensible also. I will excuse the jury at this time until 2 o'clock; unless you hear to the contrary I will expect you at 2 o'clock. Should we not need your services, you will be notified, but anyway my guess is that even for disposal of the motion it must be done before the jury, so they have got to come back at 2 o'clock anyway.

Gentlemen of the jury, subject to the continuing admonitions and instructions I have so many times given you during [206] the course of this trial, you

are excused until 2 o'clock, during which time I will hear the lawyers on these motions. You may step out.

(Jury excused.)

(Argument by Counsel.)

(At 12:30 p.m. an adjournment was taken until 1:30 p.m.)

### Afternoon Session

The Court: Very well, in this case again note the continued absence of the jury while we hear argument on these motions.

(Further argument by Counsel.)

(Recess had.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

The motions are denied and exceptions granted on each and every ground.

Do you wish to make an opening statement?

Mr. Landau: No, your Honor.

The Court: Very well. Call your first witness.

### AGNES L. KELLETT

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name? [207]

The Witness: Agnes L. Kellett.

(Testimony of Agnes L. Kellett.)

The Court: And you may tell me your age or that you are over twenty-one.

The Witness: I am over twenty-one.

The Court: Do you live here in Honolulu?

The Witness: Yes, I do.

The Court: And you are employed?

The Witness: I am employed as custodian of records at the Rent Control.

The Court: City and County of Honolulu?

The Witness: City and County of Honolulu.

The Court: You are a citizen of the United States?

The Witness: Yes, I am.

The Court: Only?

The Witness: Only.

The Court: Take the witness.

#### Direct Examination

By Mr. Landau:

Q. Now, Mrs. Kellett, I think you said you were custodian of records at Rent Control.

A. Yes.

Q. And you were subpoenaed to appear here today with records concerning 803 Hausten Street?

A. Yes, the rear house.

Q. What? [208] A. The rear house.

Q. The rear house at 803 Hausten Street?

A. Yes.

Q. Do you have those records with you?

A. Yes, I have.

(Testimony of Agnes L. Kellett.)

Q. Now, examine these records, Mrs. Kellett, and can you tell us from the examination of the record here who, on or about the 18th of June, 1949, became the tenant of the rear house at 803 Hausten Street? A. Mrs. Helen Thomas.

Q. Helen Thomas. And the date was 18th of June, I believe? A. June 18, 1949.

The Court: June 18?

The Witness: 1941.

The Court: Let me get that.

The Witness: Mrs. Helen Thomas was the tenant.

The Court: All right.

Q. (By Mr. Landau): Now, are those the records kept as a result of an ordinance of the City and County of Honolulu? A. Yes, Ordinance 941.

Q. And they are kept in the ordinary course of business as a result of that ordinance? A. Yes.

Q. Now, from your records can you tell whether there [209] was a change in the ownership of the premises, the rear house, 803 Hausten Street?

A. I have here a record, a memorandum here from Mrs. Olson. Mrs. Olson was the former landlord of that house on 803 Hausten. Would you like—or would you want me to read it?

Q. Would you read that?

A. This is dated September 15, 1949. (Reading.)

“I sold my rental property to Dr. and Mrs. Borja August 15, 1949.

“Mrs. Edna D. Olson

“Address 1856 Kapahulu Blvd.”

(Testimony of Agnes L. Kellett.)

The Court: And you may tell me your age or that you are over twenty-one.

The Witness: I am over twenty-one.

The Court: Do you live here in Honolulu?

The Witness: Yes, I do.

The Court: And you are employed?

The Witness: I am employed as custodian of records at the Rent Control.

The Court: City and County of Honolulu?

The Witness: City and County of Honolulu.

The Court: You are a citizen of the United States?

The Witness: Yes, I am.

The Court: Only?

The Witness: Only.

The Court: Take the witness.

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Q. And you were subpoenaed to appear here today with records concerning 803 Hausten Street?

A. Yes, the rear house.

Q. What? [208] A. The rear house.

Q. The rear house at 803 Hausten Street?

A. Yes.

Q. Do you have those records with you?

A. Yes, I have.

(Testimony of Agnes L. Kellett.)

Q. Now, examine these records, Mrs. Kellett, and can you tell us from the examination of the record here who, on or about the 18th of June, 1949, became the tenant of the rear house at 803 Hausten Street? A. Mrs. Helen Thomas.

Q. Helen Thomas. And the date was 18th of June, I believe? A. June 18, 1949.

The Court: June 18?

The Witness: 1941.

The Court: Let me get that.

The Witness: Mrs. Helen Thomas was the tenant.

The Court: All right.

Q. (By Mr. Landau): Now, are those the records kept as a result of an ordinance of the City and County of Honolulu? A. Yes, Ordinance 941.

Q. And they are kept in the ordinary course of business as a result of that ordinance? A. Yes.

Q. Now, from your records can you tell whether there [209] was a change in the ownership of the premises, the rear house, 803 Hausten Street?

A. I have here a record, a memorandum here from Mrs. Olson. Mrs. Olson was the former landlord of that house on 803 Hausten. Would you like—or would you want me to read it?

Q. Would you read that?

A. This is dated September 15, 1949. (Reading.)

"I sold my rental property to Dr. and Mrs. Borja August 15, 1949.

"Mrs. Edna D. Olson

"Address 1856 Kapahulu Blvd."

(Testimony of Agnes L. Kellett.)

She was the landlord as of June 18, 1949.

Q. (By Mr. Landau): And under the——

The Court: Just a minute, please. This memorandum that you have in your file from a Mrs. Olson is dated September——

The Witness: September 15, 1949.

The Court: Saying that she sold the property in question?

The Witness: As of August 15, 1949.

The Court: Thank you.

Q. (By Mr. Landau): And, Mrs. Kellett, when there is a change of ownership, under the law, does a new tenancy record have to be kept with the new owner? A. Yes. [210]

Q. At my request did you check to ascertain whether or not Dr. and Mrs. Borja have listed——

The Court: Where did they come from?

Mr. Landau: The present owners as of September 15.

The Court: She sold it to Dr. and Mrs. Borja?

Mr. Landau: Borja.

The Court: Excuse me. Read the question.

(Question read.)

Q. (Continuing): —these same premises, the rear house on 803 Hausten Street as a rental unit?

A. We have made several attempts to find this Dr. and Mrs. Borja, and up to this present date we have never found them, and we don't know whether there is any such person as that. We haven't found

(Testimony of Agnes L. Kellett.)

them yet, but the ordinance here says that within five days after renting to a new tenant or after a new landlord has acquired the housing accommodation, the landlord shall file a notice on a form provided therefor upon which he shall obtain the tenants' signature.

Q. In other words, your records do not show that there are any other tenants registered except Helen Thomas, on June 18, 1949?

A. 1949, that is right.

Q. For these premises. A. Yes.

Q. Under the law which you have just read, if there is [211] a new owner, there must be a new tenancy slip? A. Yes.

Q. And you have no such new tenancy slip?

A. No.

Mr. Landau: That is all.

The Court: Cross-examination.

#### Cross-Examination

By Mr. Hoddick:

Q. Mrs. Kellett, who files these records with your office? A. The landlord.

Q. Does the tenant ever come into your office?

A. No. See, the landlord comes to the office and files a petition with us, and we set a maximum rent ceiling to the housing accommodation and if, in the event the house is rented, a tenancy slip is given to the tenants who at that time occupy the house, and

(Testimony of Agnes L. Kellett.)

it must be filed with us within five days. And we have made several attempts to find out who this new landlord is, and we have not as yet found him.

Q. I understand that, Mrs. Kellett, but now say you have a tenant—— A. Yes.

Q. (Continuing) :——in a house, at the time that the house is first rented—— A. Yes. [212]

Q. (Continuing) :——that tenant's name will be filed with your office by the landlord? A. Yes.

Q. Now, suppose there is a change of tenancy and you have a new tenant?

A. Then the landlord comes down and files another petition with us—I mean another tenancy paper saying that tenant is no more a resident of that certain house, with the signature of the tenant on these tenancy cards.

Q. That is what the ordinance requires?

A. Yes. I have a copy of it. Do you want to see it?

Q. No, thanks. Do your records show who pays the rent on the premises?

A. It doesn't say who pays the rent, but we assume that if a tenant signs a card that naturally she pays the rent, but we have no records of that. All we are interested in——

Q. That is merely an assumption on your part?

A. Yes.

Q. I see.

Mr. Hoddick: No further questions.

Mr. Landau: Mrs. Kellett, perhaps it will be for your information to know Dr. Borja, the dentist,

(Testimony of Agnes L. Kellett.)

has offices up in the block above the Silent Barber Shop on Hotel Street.

The Witness: I would appreciate if we can find it, [213] because we have made several attempts.

Mr. Landau: You check. You might find him there. That is all. Thank you, Mrs. Kellett.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Landau: Defense rests, if the Court please.

The Court: Very well. Rebuttal?

Mr. Hoddick: No, your Honor.

The Court: Are your requested instructions ready for presentation?

Mr. Landau: Yes, your Honor.

The Court: All right. At this time I am going to excuse the jury until 1:30 tomorrow afternoon. Between now and that hour I will confer with Counsel with regard to their requested instructions and at 1:30 you will report to the Court, at which time the Court will convene and Counsel will present their respective arguments to you, after which the Court will instruct you as to the law, and thereafter you will for the first time enter upon your deliberations after arriving at the jury room. The evidence in the case is now completed.

This is a special emphasis added to the instructions which I have previously given you not to discuss this case with anyone, even fellow jurors, or to read anything about this [214] case or anything re-

lated to it, or to listen to anyone discussing it. In general, isolate yourselves from anything, either directly or indirectly, relating to this case, for as yet, though the evidence is now in, you are not at liberty to deliberate, and only after you have heard argument and the Court's instructions and you retire to the jury room and actually go into session as a jury for the purpose of deliberating are you at liberty then for the first time to discuss this case with your fellow jurors.

So at this time the Court will adjourn for the day and will immediately see Counsel in chambers for the purpose of settling instructions. So until 1:30 tomorrow afternoon you are excused.

(Thereupon, at 3:00 p.m. an adjournment was taken until January 10, 1950, at 1:30 p.m.) [215]

\* \* \*

January 10, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, for further trial.

The Court: Note the presence of the jury and the defendant, together with his attorneys. At this time, the evidence being concluded, it is in order for the attorneys to present their respective arguments to the jury, based upon the evidence, and at this time, gentlemen of the jury, if you will give the attorneys your undivided attention, they will present their argument.

Mr. Hoddick.

(Argument by Mr. Hoddick.)

(Argument by Mr. Soares.)

(Recess.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys. You may, Mr. Hoddick, present your closing argument.

(Argument by Mr. Hoddick.)

The Court: Gentlemen of the jury, if I may now have your undivided attention, I will give you the rules of law in the form of instructions which are to guide you in arriving at a verdict in this case. The rules of law which I shall give you will enable you to test, measure, evaluate, [216] and weigh the evidence which you have heard here in this Court room, and on the basis of which, and that alone, you are required, under your oaths, to arrive at a verdict, if it is at all humanly possible.

Like every criminal case, this is an important case. It is important to both the Government and to the defendant. If the defendant, upon the evidence, in your minds has been proven by the Government beyond a reasonable doubt to be guilty as charged, the Government wants you to return a verdict of guilty as charged. If, on the other hand, the Government's proof fails to measure up to the standard required by the law and he has not been shown by the evidence to be guilty as charged beyond a reasonable doubt, both the Government and the defendant and the law require that you return a verdict of not guilty.

In a criminal case the burden of proof, the burden of proving the charges laid in the indictment, is upon the Government, and it never shifts. In other words, the Government has the burden in this case, as in every criminal case, of proving to your satisfaction, by the evidence, beyond a reasonable doubt that the defendant is guilty as charged. Anything short of that requires, as a matter of law, that you acquit the defendant. That is the kind of a government we live under, thank God. There are some countries where the rule is that a man is presumed to be guilty until he proves [217] himself innocent. That is not the kind of law that we have. It is just the opposite in our country. A defendant is presumed innocent until he is proven guilty by the evidence beyond any and all reasonable doubt, and that presumption of innocence is a real, substantive provision of law which remains with the defendant and abides with him until you gentlemen, by the evidence, are satisfied beyond all reasonable doubt that he is, if he is, guilty as charged.

Let us first talk a little bit about what is evidence, what kinds of evidence there are. There are two kinds: direct and positive evidence and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. Circumstantial evidence is proof of such facts and circumstances surrounding an alleged crime from which a jury may infer others and con-

nected facts which usually and reasonably follow according to the common experience of mankind. Circumstantial evidence is regular and competent in a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same weight as direct evidence. Circumstantial evidence, in any sense, will have to be considered by you in connection with other evidence produced, but to be of value the circumstances [218] must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of guilt. In other words, the circumstantial evidence must meet these requirements in that they must add up to proof beyond a reasonable doubt.

Now, you have heard a good deal about reasonable doubt, and you are probably wondering what it is. It is a little bit difficult to define, but there is no mystery about it. A reasonable doubt is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling, or desire to avoid performing a possibly disagreeable duty. It must be a substantial doubt, such as an honest, sensible, fair-minded man might, with reason, entertain, consistent with a conscientious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a man of ordinary prudence, sensibility, and decision, in de-

termining an issue of great concern to himself, to pause or hesitate in arriving at his conclusion. It is a doubt which is created by the want of evidence, or maybe by the evidence itself. It is not, however, a speculative, imaginary, conjectural doubt. It is not incumbent upon the Government, in the trial of a criminal case, to prove a defendant guilty beyond all possibility of doubt. A juror is satisfied beyond a reasonable [219] doubt when he is convinced to a moral certainty of the guilt of the party charged.

And now, while I am on the subject of evidence, let me also advise you as to your, gentlemen of the jury, being the exclusive and sole judges of the credibility of the witnesses. That you are, and you are also the sole and exclusive judges of the weight of the evidence and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor or frankness, or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly.

In determining the weight to be given the testimony of the witnesses, you are authorized to consider their relationship to the parties, if any, their interest, if any, in the result of this case, their temper, feeling, or bias, if any has been shown, their demeanor on the witness stand, their means and opportunity of information, and the probability or improbability of the story told by them.

If you find and believe from the evidence that any

witness in this case has knowingly or wilfully sworn falsely to any material fact in this trial, or that any witness has knowingly and wilfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, misleading, or imposing upon you, then you have a [220] right to reject the entire testimony of such witness, except in so far as the same is corroborated by other credible evidence, or believed by you to be true.

If, during the course of this trial, by any remark or action of mine, or ruling during the course of the trial, you think I have any opinion as to what the outcome of this case upon the evidence should be, I want you to disregard it. I would have the right, under the law, to comment upon the evidence, but that I shall not do. It is not my purpose to invade your province, for you and you alone, as I have told you, are the final, exclusive judges of the facts established, if at all, by the evidence; so, therefore, if you have any idea that I have any opinion about this case, as to the guilt or innocence of this defendant, I want you to disregard it. You must arrive at your own independent conclusion from the evidence which has been presented, and all of the circumstances detailed by the witnesses.

And now let me come to certain specific instructions which have been requested, but before I do that, let me take the indictment in hand and once again, as I did at the outset of the trial, acquaint you with its specific language. Before I do so, let me advise you, as a matter of law, that this indict-

ment is not evidence in the slightest. It is a mere formal accusation by the Government; and, consequently, that being its nature, and it not being evidence, no juror should [221] permit himself to be in any way influenced because of, or on account of, the indictment brought against this defendant. As I have mentioned, the burden of proof is never, under our laws, upon the accused to establish his innocence, or even to disprove the facts necessary to establish the crime for which he is indicted. He is not required to put in any evidence at all upon the subject. The burden of proof, as I have told you, is upon the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.

Now, to the indictment, as I was about to come to it. The indictment provides in form as follows:

“Count 1: The Grand Jury charges that on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias ‘Frisco Shorty,’ did knowingly, wilfully, unlawfully, and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules each containing heroin; and a derivative of cocoa leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, U. S. Code.

“Count 2: The Grand Jury further charges that

on [222] or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias 'Frisco Shorty,' the identical person named in Count 1 of this indictment, being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, U. S. Code, did knowingly, wilfully, unlawfully, and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes, without having paid such tax, in violation of Section 2593, Title 26, U. S. Code."

Thus you see, gentlemen, that the accusations contained in this indictment, the charges, are two in number, counts 1 and 2. And as to the details alleged in this indictment, the counts of which I have just read to you, the Government is required to prove those charges beyond a reasonable doubt.

Under the law, gentlemen, no jury should convict a person charged with a crime upon mere suspicion—not only should not, but must not—however strong that suspicion, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can be convicted of a crime is not suspicion, not mere probabilities, but, as I have told you, proof which excludes all reasonable doubt as to innocence. [223]

When faced with this indictment, the defendant entered a plea of not guilty, and such plea puts in

issue the allegations contained in the indictment and requires the Government to prove such allegations to your satisfaction beyond all reasonable doubt before a verdict of guilty can be returned against the defendant.

As I have told you, and will tell you again, the defendant enters upon the trial presumed to be innocent of the charge until he is proven guilty beyond a reasonable doubt by the evidence. A defendant is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering the testimony in the case, you must look at such testimony and view it in the light of that presumption of innocence with which the law clothes the defendant, and you must remember that it is a presumption that abides with him throughout the case until the evidence convinces you to the contrary beyond all reasonable doubt.

And as I have already told you, but will repeat, this presumption of innocence is not a mere form. It is not something you can cast aside at your pleasure, but it is an essential, substantial part of the law of the land, and is binding upon the jury in this case, as in all criminal cases. It is your duty as jurors to give the defendant in this case the full benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces you of his guilt as [224] charged beyond all reasonable doubt.

Again, at the risk of being slightly repetitious, let me tell you that in criminal cases, even when the

evidence is so strong that it demonstrates the probability of guilt of the party accused, still if it fails to establish beyond a reasonable doubt the guilt of the defendant in the manner and form charged, then it is your duty, as jurors, to acquit the defendant and to bring in a verdict of not guilty.

As I have mentioned, mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chances, it is more probable that the defendant is guilty. To warrant a conviction of the defendant he must be proved to be guilty beyond all reasonable doubt when all of the evidence in the case is considered together.

Similarly and related to the subject that I have just instructed you upon, put differently, one accused of crime cannot be convicted unless the evidence excludes every reasonable hypothesis of innocence of the crime charged. And, in this case, if, from all the evidence, you should find that the defendant's guilt is not established beyond a reasonable doubt, you must find him not guilty even though you should believe that the evidence points with equal force to his guilt.

Otherwise stated, the rule of law is that if two reasonable constructions can be placed on the evidence, one [225] of which is consistent with defendant's innocence of the crime charged or even leaves a reasonable doubt in your minds as to his guilt even though the other is equally consistent with his guilt, you must still find him not guilty.

This is a humanitarian provision of law which is

not to be lightly disregarded by you, and you must keep it in mind at all times and give the defendant the benefit of it, all of which is another way of saying, as I have told you, that the Government must prove its charge beyond all reasonable doubt.

Mr. Soares: May I interrupt you. My copy of the instruction clearly says "regarded."

The Court: Excuse me?

Mr. Soares: Says "regarded," not "disregarded."

The Court: Yes, it says "regarded," and I maintain it should be "disregarded." It is not to be disregarded.

Mr. Soares: Correct.

The Court: I have told you the nature of a reasonable doubt, but as it is of great importance in every criminal case that you clearly understand reasonable doubt, it is not amiss to define it from several standpoints and in a variety of words, so let me once again, pursuant to request, define for you in another form the meaning and significance of the term "reasonable doubt."

A reasonable doubt may arise from the evidence or it [226] may arise from the lack of evidence. It is such a doubt as would cause you, as reasonable men, to hesitate to act upon it in matters of importance to you.

It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exists in the mind when the judgment is not fully satisfied as to the truth of a

criminal charge or the occurrence of a particular event, or the existence of a thing. It is a matter that may be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the court, you are not satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you will return a verdict of acquittal.

I have already told you the nature of evidence, direct and circumstantial. I am going to omit that.

Concerning Count 1 of this indictment, which is a charge framed under the Harrison Anti-Narcotics Act, the law invoked provides as follows:

“It shall be unlawful for any person to purchase, sell, dispense or distribute any of the drugs mentioned in Section 2550(a)——”

2550(a) includes both heroin and cocaine. Let me go back over that. [227]

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special

taxes as required by sections 3221 and 3220 shall be *prima facie* evidence of liability to such special tax."

There follow two exceptions. I shall not read them, other than to indicate they apply to drugs dispensed pursuant to prescriptions by doctors and registered dealers, or dispensed directly to patients by physicians, dentists, veterinary surgeons, or other practitioners in the course of professional practice, or dispensed for legitimate purposes.

As you gather from my reading of the indictment and from listening to the arguments of counsel, Count 1 of this indictment charges the defendant with unlawfully purchasing cocaine and heroin, but you haven't heard a word in the evidence about any purchase. The reason for that is contained in the statute itself, for in order to prove Count 1 the evidence must satisfy you beyond a reasonable doubt as to the following: [228]

(1) That the drugs in question were heroin and cocaine. I will comment on the evidence to this extent, that there is no dispute in the evidence that the drugs in evidence are as alleged in the indictment, namely, heroin, cocaine, and marihuana.

(2) Under Count 1 it is alleged and must be proven that the defendant purchased these drugs, cocaine and heroin.

(3) The Government must prove, by the requisite degree of proof, this additional fact, that that purchase was not in or from an original stamped package.

Now, if the evidence satisfies you beyond a reasonable doubt that there was an absence of Internal Revenue stamps upon these drugs and further satisfies you beyond a reasonable doubt that the defendant had possession of these drugs, then there arises as a matter of law a presumption that there exists on the part of the defendant a *prima facie* violation. In other words, proof beyond a reasonable doubt of possession of these drugs from which are absent tax-paid stamps creates a *prima facie* case of a violation of this particular section of the law which I have just read to you.

What does that mean? It means that at that point, though the burden of proof remains the same, and remains continually, as it does, upon the Government, that at that point, if you are satisfied beyond a reasonable doubt of the things that I have mentioned, and this presumption arises, there is cast [229] as a matter of law upon the defense the burden of going forward with the evidence to explain satisfactorily that possession. If that burden of going forward and satisfactorily explaining possession is not discharged by the defense, then as a matter of law that presumption takes the place of proof as to the purchase, that it was a purchase not in or from an original stamped package and warrants a conviction. That is why you have heard the lawyers tell you that the pivotal point in this case is a question of fact, as well as law, as to whether or not the evidence satisfies you beyond a reasonable doubt that the defendant did have pos-

session of these drugs and that those drugs did not have upon them Internal Revenue stamps indicating that they were tax-paid.

This is one of the few instances in the criminal law where there is such a presumption, but I repeat that it does not disturb the burden of proof, but it is simply a presumption, which, if erected upon the facts found by you, places a burden of explanation upon the defendant. The law amounts to this: that one proven to be in possession of drugs has a burden of going forward and explaining that possession as being lawful, innocent, or unconscious.

Well, I might as well come to Count 2, which is slightly different, and tell you about that.

Count 2 is under the Marihuana Act. It provides as follows: [230]

“It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a)——” and 2590(a) imposes a tax on the transfer of drugs such as marihuana. Now, to repeat:

“It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).”

Now, what does that mean? It means that as to Count 2 of this indictment the Government must prove the following:

They must prove first that the drug is marihuana. That has been proven, as I have told you.

It must next prove beyond a reasonable doubt that the defendant is a transferee required to pay the tax imposed upon the transfer of marihuana.

It must next prove beyond a reasonable doubt that the defendant acquired this marihuana without having paid the tax imposed by law.

Now, if the Government proves to your satisfaction beyond [231] a reasonable doubt that the defendant had in his possession this marihuana, and it further proves by the same degree of proof the defendant's failure, after reasonable notice and demand by the Collector of Internal Revenue, to produce the order form covering this marihuana and required to be retained, then, if those things are proved, as I read to you in the statute, there arises a presumption of guilt and a liability for the tax. And, again, the defendant may explain to your satisfaction his possession. If he does not, this presumption, if it is erected by the evidence to your satisfaction by the requisite degree of proof, that presumption, I say, establishes a *prima facie* violation of this law and takes the place, as a matter of law, of proof that the defendant was a transferee required to pay the tax and that the defendant acquired the drug without having paid the tax.

That, again, is why, as to Count 2, the attorneys

have told you in their arguments that the pivotal point is: Did the defendant, according to the evidence, have, beyond all reasonable doubt, possession of the marihuana?

Now, returning to the requested instructions, some of which duplicate what I have already told you, but it is rather involved, so I will, nevertheless, despite my instructions, read these additional requests to you.

As indicated in the first count of the indictment, the defendant is charged with the unlawful purchase of cocaine [232] and heroin. The statute defining this alleged crime makes unexplained possession of heroin or cocaine and the absence of appropriate tax-paid stamps therefrom *prima facie* evidence of their unlawful purchase. With this statutory presumption it is not necessary that the Government introduce any evidence relating directly to the purchase if the Government has satisfied you beyond a reasonable doubt, by the evidence which it did adduce, that the defendant had conscious possession of the heroin and cocaine described in Count 1 of the indictment, and of that possession there has been no satisfactory explanation by the defense. This means that if you are convinced beyond a reasonable doubt that the defendant had in his conscious possession on or about July 16, 1949, heroin and cocaine, to which the appropriate tax-paid stamps were not affixed, you must find the defendant guilty of the offense charged in the first count of this indictment.

This seems repetitious, but I had better read it nevertheless.

You are instructed that as to Count 1 the defendant is charged with knowingly, wilfully, unlawfully and feloniously purchasing a salt, compound and derivative of opium, and the Government must prove beyond all reasonable doubt all of the material allegations in said count. Those material allegations are: (1) the drug is as alleged, namely, heroin, cocaine, or marihuana, depending on the count of the indictment; [233] (2) that the items mentioned in the count were not at the time of purchase in the original stamped package and further that they were not from the original stamped package; (3) that the defendant did in fact purchase on or about July 16, 1949, the items listed in Count 1. If you have a reasonable doubt as to any of the above material allegations, you must acquit the defendant as to Count 1.

Before I forget it, with respect to the statutory burden placed upon the defense of going forward with the evidence, once you are satisfied beyond a reasonable doubt as to possession of the alleged narcotics and the absence of tax-paid stamps, I want to make it clear that that is an obligation of going forward on the part of the defense, to explain that possession to your satisfaction as being lawful, innocent, or unconscious, and that does not mean that the defendant, who is presumed innocent until proven guilty beyond all reasonable doubt, has any obligation to take the stand and testify in his own

behalf. It simply means that somebody on the side of the defense must, in the face of that situation, come forward with a satisfactory explanation of that possession. From the fact that the defendant has not testified in his own behalf you are not allowed to draw any inferences whatsoever.

Well, this I think I have covered, but I had better read it. You are instructed that as to the charge in Count 1 the statute states in effect that the "absence of appropriate [234] tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found." This means that before this theory can be considered by you you must first find beyond all reasonable doubt that there was an absence of appropriate tax-paid stamps and, secondly, that the defendant was in possession of them at the time that they were found. If you have a reasonable doubt as to either of these matters, you must acquit the defendant for the reason that there is no evidence of a direct purchase by the defendant.

This next request relates to Count 2. I think I have satisfactorily explained the operation of that law without reading that again. I am going to pass it, unless you think it is not already covered. Do you want me to read it?

Mr. Hoddick: No, your Honor.

The Court: As to Count 2 the defendant is charged with being a transferee required to pay the tax imposed by law and acquiring and other-

wise obtaining the articles mentioned therein without having paid such tax, and, as I have told you, the Government must prove beyond all reasonable doubt that the defendant was in fact a transferee of the articles mentioned therein and was, therefore, required to pay the transfer tax. If you have a reasonable doubt as to the allegation that he was a transferee, you must acquit the defendant. This, like the other repetitious instructions that I have read, must be [235] taken together with the law I have given you as to what happens if the presumption is found by you beyond a reasonable doubt to be erected from a finding by you beyond all reasonable doubt of the fact of possession, and if, as I have told you, that presumption comes into operation and there is no explanation of the possession, then that takes the place of proof of the things I have just outlined to you the Government must prove.

Now, let's get to this matter of possession, which the attorneys are in agreement is the key to this case.

To support a conviction of the charges contained in this indictment you must be convinced beyond a reasonable doubt that the defendant had possession of the narcotics described in the indictment. That possession must have been conscious and it must have been either actual or physical, or it may have been constructive possession. In determining whether the defendant had conscious possession, either physical or constructive, of the narcotics, you

are instructed that possession means the holding or retaining of property in one's control, and that one has possession of personal property when it is under his dominion and subject to his control. This means that the possessor must have had the power to exclude others having no better claim thereto from exercising dominion and control over the property. Possession once acquired may be preserved by the mere intention of the possessor, and in the [236] absence of actual or physical possession, if the possessor still intends to retain control and dominion over the property, he is deemed to have constructive possession of that property.

One or two other definitions of possession. Possession means control of a thing to the exclusion of other persons having no better claim to it. In other words, before you can arrive at a decision with reference to the fact of possession beyond all reasonable doubt, you must find either that the defendant was in physical and actual possession of the articles mentioned in the indictment or that the evidence shows directly or indirectly that those articles belonged to him or that they were on the premises within the exclusive, ultimate control of the defendant. If you have any reasonable doubt as to this situation or if you have any reasonable doubt that the premises in which these articles were found were in the exclusive, ultimate control of the defendant, you must acquit him of the charges. In connection with the question of possession, mere knowledge of the whereabouts of the articles or the

knowledge of their contents or recognition of their contents after they have been found is not sufficient to base a finding of possession.

With respect to the quantity of heroin and cocaine alleged in Count 1 of the indictment, it is not incumbent upon the Government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence [237] that the defendant had in his conscious possession 915 capsules of heroin and any quantity of cocaine less than 250 grains, that is sufficient to support a verdict of guilty as to the first count of the indictment. In other words, the important thing is that there was established by the evidence beyond all reasonable doubt the fact of the possession of some cocaine and heroin. The exact quantity, the exact weight, is not of particular importance.

Similarly, as to the marihuana, with respect to the quantity of marihuana alleged in Count 2, it is not incumbent upon the Government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence that the Defendant unlawfully acquired or obtained a lesser quantity of marihuana cigarettes and a lesser quantity of bulk marihuana, that is sufficient to support a verdict of guilty as to the second count of the indictment.

As I have told you already, the defendant is not compelled to testify in his own behalf. He is presumed to be innocent until he is proven guilty beyond all reasonable doubt. The burden of proving him guilty is upon the United States.

The fact that the defendant has not testified in his own behalf shall not be considered by you in determining the question of his guilt or innocence.

A person under arrest has a constitutional privilege not to make any statement, and his failure to make a statement [238] cannot be considered by you as evidence in arriving at your verdict, nor can his silence or lack of denial of an accusation made to him or in his presence be considered by you in any manner in arriving at a verdict against him. You are also instructed that you may, however, consider free and voluntary admissions, if any, made by the defendant and free and voluntary acts of the defendant performed, if any, while he was under arrest. In other words, a person under arrest has a constitutional right to refrain from saying or doing anything. He cannot be compelled to say or do anything. But that does not mean that if he wishes to, he may not say or do anything, if he does so without compulsion or coercion and wishes to do so.

Finally, gentlemen, as you know, the only verdict known to our law is a unanimous verdict of the jury. A unanimous agreement of the jury is necessary for a verdict. This is in no wise to be considered by you as a justification for abandoning your individual convictions or beliefs or doubts. While a unanimous verdict is required, it must be arrived at by each juror's voting as he believes the law and the evidence justifies him to vote. While, of course, each of you must give due regard to the

opinions of the others, you are not required to substitute the opinion of a fellow juror for your own simply for the purpose of arriving at a unanimous verdict.

To illustrate, if after full and fair deliberation, one [239] or more of you believe from the law and the evidence that the guilt of the defendant is established so clearly and convincingly as to leave no reasonable doubt in your minds, you are not to vote "not guilty" merely because a majority of the jury does not believe the defendant guilty or has a reasonable doubt of his guilt. So, too, if one or more of you, after a fair and impartial discussion with your fellow jurors, are not convinced from the evidence and the law beyond a reasonable doubt that defendant has been proved to be guilty of the crime charged, you are not to vote "guilty" merely because a majority votes that way. The "unanimous" verdict of the jury must be the sum total of your individual beliefs and is not to be arrived at by an arrangement of mere compromise.

In other words, each and every one of you, in order to convict, must be satisfied beyond a reasonable doubt that under the law as I have given it to you and the evidence and the facts as you find them from the evidence that the defendant is guilty beyond all reasonable doubt. Otherwise, he must be acquitted, if there is not such a unanimous finding.

One of you asked about the defendant's business and I told you that I would not answer that question, or words to that effect. What the defendant's

business is has no relation to this case, and as I have told you, he is not required to testify, and the fact that he has not testified is not to form the basis of any adverse inference against him. He is [240] charged in the words of the indictment, and we are not interested in what his business is. So, too, you gentlemen are only interested in the question of: Is he guilty or not guilty, established by this evidence and the law as I have given it to you? As to what happens after that is no concern of yours. You are simply called upon to answer questions as to both counts of this indictment as to whether the evidence establishes his guilt beyond all reasonable doubt. If it does not, you are to return a verdict of acquittal, and he walks out of the court room free.

(Court and Counsel confer.)

The Court: At this time I will ask the jury to step outside of the court room momentarily while I hear the lawyers on various points of law briefly. Bear in mind as you go that the case is not yet yours for discussion or deliberation, so maintain the continued silence that I have admonished you to maintain; but the time is close at hand when you can talk among yourselves.

(Exit jury.)

The Court: The jury being absent, are there any exceptions that the defense wishes to take to my charge to the jury?

Mr. Landau: Yes, your Honor, we except to the Court's refusal to give defendant's requested instructions Nos. 1, 2, 3, 6, and 8, and to the giving of the prosecution's [241] instructions Nos. 9 and 10.

The Court: Very well.

Mr. Landau: For the reasons, in all cases, that were discussed and stated for the record in chambers while the instructions were being discussed.

The Court: The record may show.

(Following is the record as to objections made in chambers during the settling of instructions, morning session, January 10, 1950:)

As to Government's Instruction No. 9:

“Mr. Landau: Consistent with our motion for directed verdicts, if the Court pleases, we can't agree.

“The Court: On the point of variance?

“Mr. Landau: On the point of variance. That is, that we contend that variance is fatal.”

As to Government's Instruction No. 10:

“Mr. Landau: We take the same position as we did to No. 9, if the Court pleases, on the ground that we feel that there is a great variance and that proof of a lesser amount does not support the indictment.”

The Court: Very well. Have you anything you wish to say?

Mr. Hoddick: Nothing.

The Court: Call the jury back.

(Jury returns.) [242]

The Court: Very well, at this time, Mr. Clerk, you may swear the Marshal and his assistant to take charge of the jury.

(Marshal Otto F. Heine and George Bruns sworn.)

The Court: All right, gentlemen of the jury, the time is now at hand when you may retire to the jury room to deliberate upon your verdicts. I say "verdicts" because there are two counts to this indictment. A form of verdict has been prepared and you will fill in the blanks to conform to the findings that you make.

Your first order of business will be to elect from amongst your number one to serve as your foreman. I will allow you to use this court room as the jury room because I am ashamed, as always, of our real jury room, which is upstairs, in a dilapidated condition. Therefore, I will direct the Marshal to clear this court room and to close all avenues of anyone's hearing what goes on in this room, closing the necessary windows, doors, and transoms. The jury may have access to my lavatory, and he will lock the door to my chambers.

After this room is transformed to a jury room and the Marshal steps out of the door, then for the first time you may sit down and start deliberating. I don't want any discussions going on or talking about this case while he is clearing the room to make it available for you gentlemen as a jury room.

If any of you have any telephone calls you want to make— [243] Mr. Andre. What is the nature of your 'phone call?

Juryman Andre: My wife.

The Court: Any objection to his calling his wife?

Mr. Landau: No, your Honor.

The Court: I take it to tell her you will probably be late, or something of that sort?

Juryman Andre: I intend to ask her to take my boy to the football game this evening.

The Court: You may go in the company of the Marshal to the telephone to make one telephone call to your residence to leave that message, or you can have the Marshal do the 'phoning for you.

Juryman Andre: That would be satisfactory, your Honor.

The Court: Perhaps that would be better. Do you want to give him the tickets, too?

Juryman Andre: I have a nickel here.

The Court: There is no charge for the call.

Juryman Andre: Oh, I was looking for a nickel.

The Court: There is no charge for the call. But there is no problem about the tickets that you want your wife to use? You don't have them in your back pocket?

Juryman Andre: No. I would like her to make arrangements to take my son this evening because he is very anxious to see these players. [244]

The Court: I think my son is, too, and no doubt Mr. Landau's and Mr. Fairbanks' also.

Are there any other messages about family or car

or traffic parking regulations or anything of that sort?

Juryman Kramer: My car is down on the highway where it has been parked all the time. I suppose it is all right.

Marshal Heine: If it is tagged, I think I can get him off.

The Court: They tell me you shouldn't worry about it. I don't know why, but I would tell the Marshal where your car is and he can go turn the lights on.

Juryman Kramer: It is a gray Chrysler.

The Court: Between here and the Territorial Court Building?

Juryman Kramer: That's right.

The Court: Do you get a ticket every day?

Juryman Kramer: I went to the Police Station and they told me to leave a little note in the car, and that is what I have been doing.

The Court: All right. Any other messages?

(No response.)

The Court: Very well. I don't want any contact with this jury. I want this oath that you gentlemen, as marshals, have taken strictly adhered to. If there is any [245] problem, you come and see me.

Marshal Heine: If the Court please, if they want anything, they will have to put it in writing, and I will so instruct them.

The Court: The jury may take to the jury room with them the evidence and a copy of the indictment, if they so desire. Do you wish it?

Jury: Yes.

The Court: Very well. At this time the court will stand at recess. Oh, yes, a copy of the verdict form.

(Thereupon, at 4:40 p.m., January 10, 1950, court was recessed while the jury retired to deliberate.) [246]

(The Court reconvened with the Jury present at 5:05 p.m., January 10, 1950.)

The Court: Note the presence of the Jury and of the Defendant together with his Attorneys. I have been handed by the Marshal a note from your Foreman, gentlemen, which I have exhibited to the Attorneys. It reads:

“We want the Judge’s instructions regarding possession, what is possession.

“/s/ LEO F. ANDRE,  
“Foreman.”

Mr. Clerk, take this. Rather than give you the typewritten instructions I deemed it advisable to bring you in court for the purpose of finding out exactly what it was that is bothering you on the subject of possession. Am I correct in gathering from your message, Mr. Andre, that the Jury would like the Court to again define the nature of possession?

Mr. Andre: Your Honor, a number of the Jurors—

The Court: Just state what the question is with-

out telling me what they think one way or another. What is the problem?

Mr. Andre: We would like to have a definition of the word "possession." You read it in your instructions but there are differences of opinion as to what constitutes possession.

The Court: All right. Possession is both a factual and a legal matter. It is what we might call a mixed question [247] of law and fact. You know when you have possession of something that is in your hands, for then and there you have it within your control and custody, and have the ability to exercise exclusive dominion, power and control over it.

We are talking here in this case about the possession of a thing. We are not talking about the possession of real estate. We are talking, to repeat, about the possession of the alleged narcotics charged in this indictment. That comes in the nature, within the classification of a chattel or a personal property, so to speak. It is not real estate, in other words. Basically, the thing to bear in mind is that as to a thing, a chattel, like your watch, your fountain pen, it is in your possession when you have actual custody of it and thus the ability to exercise control, exclusive control and dominion, power over it. If you have left it on your desk in your office and do not have it currently with you in your hand you still have possession of your pen; only that kind of possession is known as constructive possession. It is something that is yours. It is something which you have had in your actual possession, put down

without any intent to abandon it, and nobody else has picked up and claimed to exercise power of dominion and control over it.

So, too, for example, as you sit here in the courtroom, of the personal things in your home which are yours. You are not at home holding them in your hands, but as you sit [248] here in court, those things which are yours in your home are in your constructive possession. You have not abandoned your intention to control the disposition of those personal items, that personal property; nor has anyone else taken charge and taken the things into his or her actual possession with intent to exclude you from your exercise of power and control over them.

Similarly the juror whose car is parked out here in the street. He is not in the car but it is his car. When he parked it there he didn't abandon it. And if it is still there, as we presume it is, that car is still in his possession in point of law, and that we call constructive possession as distinguished from actual possession which is something in hand.

Let me reread to you the instructions that I gave you previously on this very subject.

"Possession must have been conscious and it may have been either actual or physical or it may have been constructive \* \* \*"

Both of which terms I have defined for you in different language just a moment ago.

"\* \* \* In determining whether the Defendant had conscious possession, either physical or con-

structive of the narcotics, you are instructed that possession means the holding or retaining of property in one's control, and that one has [249] possession of personal property when it is under his dominion and subject to his control. This means that the possessor must have had the power to exclude others having no better claim thereto from exercising dominion and control over the property. Possession once acquired may be preserved by the mere intention of the possessor, and in the absence of actual or physical possession, if the possessor still intends to retain control and dominion over the property, he is deemed to have constructive possession of that property."

Translated again, that means the extra pair of shoes that you have at home in the closet that you intend to wear tomorrow; they are still your shoes, even though you sit here in court and you have constructive possession of them. You have had actual possession of them. It is not necessary that you continue to wear those shoes in order for them to be yours and in your possession. They are still under your control and dominion. And this was the other definition of possession which I read to you:

"Possession means control of a thing to the exclusion of any other person having no better claim to it. In other words, before you can arrive at a decision with reference to the fact of possession beyond all reasonable doubt, you must find either that the Defendant was in physical and actual

possession of the articles mentioned in the indictment or that the evidence shows directly or indirectly that those [250] articles belonged to him or that they were on the premises within the exclusive, ultimate control of the Defendant. If you have any reasonable doubt as to this situation, as to whether the evidence shows directly or indirectly those articles belong to him, or if you have any reasonable doubt that the premises in which these articles were found were in the exclusive, ultimate control of the Defendant, you must acquit him of the charge. In connection with the question of possession mere knowledge of the whereabouts of the articles or the knowledge of their content or recognition of their content after they had been found, is not sufficient to base a finding of possession."

Let me explain that last language. Supposing I know as a fact that Mr. Thompson, the Clerk of our Court, has a box of candy in his desk. The mere fact that I know that he has it doesn't mean that I have possession of it. Nor does the fact if that box of candy, for example, should be shown to me, does the fact upon that showing that I know it is candy mean that it is mine, that I have had possession of it. Possession is basically a question of fact, and so far as we are concerned here it is a colorless fact. We are not talking about whether this possession is guilty or innocent possession. The question is, has the Government proven beyond any or all reasonable doubt the fact of possession by

this Defendant of the narcotics charged in this indictment? [251] Bear in mind, as I have indicated before, the distinction between personal property which is subject to actual and constructive possession and, for example, the possession of personal property in a house which arises from control of the real estate. They are two separate things. We are talking about basically the possession of personal property. But like the case of your shoes at home in the closet, if it is your house you still have constructive possession of those shoes in your closet, even though you do not now have them on your feet here in court. Let me read you another definition of the word "possession." For the record, I am reading from 49 Northeastern 2nd, 130, which quotes the restatement—

Mr. Landau: I'm sorry, your Honor, I was not able to get it.

The Court: 49 Northeastern 2nd, at page 130, which quotes the restatement—

"A person who is in possession of a chattel is one who (a) has physical control of a chattel with the intent to exercise such control on his own behalf, or, otherwise than as servant, on behalf of another, or, (b) has been in physical control of a chattel with intent to exercise such control, although he is no longer in physical control, if \* \* \*"—like your second pair of shoes— [252] "\* \* \* he has not abandoned it, and no other person has obtained possession."

And finally,

"If the person has the right as against all others to the immediate physical control of a chattel, if no other person is in possession."

Are there still questions on what we mean by "possession"? If not, I think that will suffice.

Mr. Landau: May I take exception to the Court's instructions on the ground that the instructions as given are misleading and not a proper statement of the law as I understand it to be.

The Court: You may.

Mr. Landau: From my study and examination of the discussion.

The Court: You may. Very well. The Court will again stand at recess to await the Jury's verdict. The Court will be cleared as before, subject to the same instructions.

(The Jury retired again to deliberate.)

(The Court reconvened at 10:50 p.m. with the Jury present.)

The Court: Note the presence of the Jury and of the Defendant together with his Attorneys. I am in receipt of a message from the Jury's Foreman asking, 1, permission for the Jury to retire for the night and, 2, to have a transcript [253] of the Court's instructions ready for the Jury when they begin deliberations in the morning. As to request No. 1, I think it is a very sensible request and I am going to grant it. I think a good night's sleep will do you all good, especially since that clock up there

is deceptive. It is not running at all. And, Mr. Marshal, you will forthwith make arrangements to take the Jury to a hotel, to have the authority to give them a midnight snack, if they wish it, and you may also ascertain from the jurors if they wish you to make any calls for tooth brushes and pajamas and slippers and robes and that sort of thing, and to notify their families that they will not be home but they will be in good care and custody under your supervision. And, gentlemen of the jury, as you retire for the night, though you will not be allowed to go to your homes, you will to a limited extent be separated by the necessities of hotel accommodations, but otherwise not separated; you are not, from the moment you are excused for the purpose now of retiring, to in any way continue your discussions of this case, not even with your fellow roommates should you have one over night. Your fellow roommate is a juror. In other words, forget this case from the moment, from this moment until tomorrow morning, until you start your deliberations again. You yourself can be thinking about it but I don't want you to be discussing it with anyone, with any one of your fellow jurors. I would suggest [254] that you be ready to come to court for such disposition as I make of your second request at, shall we say nine; are you all early risers? Is nine too early or would you rather have it at ten?

A Juror: Nine is all right.

The Court: Is that agreeable to the Attorneys?

Mr. Landau: Yes, your Honor.

The Court: All right. I am not going to comply with your second request in full, as you have requested it, for several reasons. One is that it is almost humanly impossible to have a transcript of my instructions ready by the morning because, like yourself, the court reporters are practically exhausted. And I think also it is preferable to convene court and to go over certain instructions and do as I did this afternoon when you requested additional instructions on the subject of possession. So, as I approach this request No. 2 at this moment, I will plan to discuss with you before you resume deliberations the substance of the Court's instructions in the morning at nine. Now, are there any other matters?

Marshal Heine: If the Court please, I'd like to have my chief deputy, Thomas Clark, sworn in in place of George Bruns.

The Court: Well, where is Mr. Bruns?

Marshal Heine: I sent him home. [255]

The Court: Well, I didn't believe him. He was sworn to take charge of the Jury. You had no right to excuse him.

Mr. Clark: He is ill.

Marshal Heine: He is ill.

The Court: That is entirely different. I'd like to know about those things. You yourself have been in charge of this Jury continually?

Marshal Heine: Yes.

The Court: All right. Please let me know when

those things happen immediately. Mr. Clark may be sworn in place of Mr. Bruns. Mr. Bruns is relieved.

(Thomas Clark, Chief Deputy Marshal, sworn to take charge of the Jury.)

The Court: All right. The Court will at this time stand adjourned for the day until nine o'clock tomorrow morning. Bear in mind the admonitions that I have given you, and as the Court adjourns you will have to stay here in the courtroom until the Marshal is ready to take you to the hotel. But you can speak to him about the telephone calls, and so forth, that you want him to make in your behalf. It is best that he make them. But Mr. Clark will assist and there should be no great delay while those telephone calls are made.

A Juror: Would you allow me to make any personal calls? The reason is that the Marshal tried to get my home and it is impossible, and I have a car parked in the Sears-Roebuck lot [256] with the key in the back, and I would like to contact someone in there but in all probability I will have to talk to two or three people before I get the right person to go out and find out whether the car is there. And they will probably either have to make an arrangement to get the car away from there or something, unless I leave it there, but I don't know if it is allowed.

The Court: Well, I think in this instance it is all right to let him, under the Marshal's supervision, to make the calls himself. Are there any other car problems or any other problems?

Mr. Landau: I was going to suggest that I know there are some cars parked, at least one of them, right on Milalani, and they can't park there after one or two o'clock without getting a ticket.

The Court: Well, as to that type of situation, give your keys to the Marshal and he will make arrangements to take care of the car for you. You can make all those necessary arrangements. I don't want you making extraneous telephone calls. I give you blanket authority to tell the Marshal just what you want him to do, and I think you will find him very cooperative. I appreciate your frank disclosure, but he will definitely make those calls for you. All right, then, until tomorrow morning at nine.

(The Court adjourned at 11:10 p.m.) [257]

January 11, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry.

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Last evening at approximately 11 I sent the jury to retire under the supervision and in the custody of the Marshal. All twelve of them are now present. I trust that they have had a good night's sleep.

Before directing them to resume deliberations, I want to come now to the second request which the jury made last evening in addition to permission asked relative to retirement.

The second request was, as you all remember, that there be made available to the jury this morning a

transcript of the Court's instructions, and as I indicated last evening at the late hour, (1) it was not physically possible to have a transcript of the instructions prepared by this morning, and (2) even if it were, I was not sure that I would give you those instructions in written form. As I indicated, or intimated, last evening, in lieu thereof I am going to go over the instructions this morning in my own language and words. I am also going to review some of the evidence for you, but as I do, I want you to bear in mind, as I have told you before, that, though I have the right to comment upon the evidence, I [258] will endeavor to refrain therefrom; but, in any event, should I go over the line and tend, in your opinion, to comment upon the evidence, I want you to remember that it is not what I think or what my opinion may be, but a question to be decided by you. The evaluation of the evidence, the recollection of the evidence, and the findings of fact from the evidence which you are to make are exclusively within your province, and you are to disregard any opinion that you might think that I have.

Similarly, as I review some of the evidence, again it is not what I recall, it is what you recall that the witnesses actually said.

Now, I spent some hour or more yesterday reading to you instructions that the attorneys on both sides requested that I give you. In addition, I gave you some fundamental, basic instructions of my own, and I analyzed the statutes, two in number, that relate to the two counts of this indictment, in my own

language. It occurs to me overnight that between the language that I used and the language that I was requested to read to you that there was probably too much lawyer's language in there for you to digest as readily as we lawyers are able to digest such language, and, as I have been told very definitely by the Supreme Court of the United States, instructions are for the purpose of helping the jury understand the law in plain, ordinary language so that they can apply it. So it is because I feel that I have been remiss [259] in reducing that law to plain, simple language that I am going to review the substance of my instructions this morning. Before I do so, let it be recorded that with regard to anything and everything I say the defense may have full and complete exceptions. I do not want to be interrupted during the time that I am talking, but at the conclusion of my remarks I will give you ample opportunity to except to anything I do or say, so if you will make notes of what you want to object to, I will give you ample opportunity. I do not accord that same privilege to the Government, because it hasn't the privilege of taking the exceptions to what I say, or if it does, it doesn't do it any good.

As mentioned yesterday by the attorneys and as stressed by the Court, reduced to its simplest language this case boils down to a question for you to determine as to whether or not the defendant had possession, actual or constructive, of the narcotics, drugs, alleged in the two counts of this indictment. That is the pivotal, basic question.

It is relatively a simple question, but it is one which must be decided upon the evidence which you gentlemen have heard here in court in this case, and upon nothing else. As I talk to you this morning, I want you continually to bear in mind what I have told you before, and what I am saying is simply to better enable you to understand what I have said before, for I am not going to say anything different. I am simply [260] saying it in my own language, which I hope will be a bit clearer than the language which I used yesterday.

I simply, therefore, recall to your minds that which remains true, that in this, as in any criminal case, the burden of proof to prove all of the necessary factors to constitute the offense is upon the Government, and that burden of proof does not shift. I have talked yesterday and will today talk about a different kind of a burden, which does not disturb the ultimate burden of proof. This other burden that I have spoken of and do refer to and will explain in greater detail later is simply the burden of going forward with the evidence. Those are technical, legal terms, but I think I can make it clear to you what I mean. I repeat, the burden remains on the Government throughout the case from the beginning to the end. Also, this very real, substantial presumption of innocence surrounds the defendant and remains with him until by the evidence, as measured and tested by the law, you are, if you are, satisfied beyond a reasonable doubt of his guilt as charged.

Let us take up the subject of the law once again as to counts 1 and 2. In order for you to understand it better I will draw you, as I have had to do for myself, a diagram. Mr. Clerk, you make a copy of what I put on the board so that you have a record of it.

The Clerk: Yes, your Honor. [261]

The Court: Count 1 of the indictment, you will recall, deals with two kinds of drugs, heroin and cocaine, and it is alleged by the Government that the defendant purchased a certain quantity of heroin and cocaine.

Now, under the statute, which I have read to you before, and repeat again, it is provided by law that "it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a)"—and that includes heroin and cocaine—and remember he is simply charged with purchase—"except" the statute goes or "in the original stamped package or from the original stamped package; \* \* \*" Now, "original stamped package or from the original stamped package" means this: "stamped" refers to Internal Revenue stamps required to be placed upon drugs and the tax paid upon their value in accordance with the statute; and "the original stamped package" means the original package from which they came from the factory; "from the original stamped package" means when they are lawfully dispensed pursuant to prescriptions by a doctor or otherwise directly to a patient from an original stamped pack-

age. You will remember that I mentioned that yesterday, as those are exceptions to the statute, namely, prescriptions and dispensations directly by doctors to patients.

Now let us read this again:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package;...”

And the statute goes on and says:

“And the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found;...”

Now, what does the Government have to prove under count 1? It must prove the nature of the drug. There is no dispute in this case that the drugs in evidence are cocaine and heroin.

They must prove that the defendant, as charged, purchased those drugs and at the time of purchase the purchase was not in or from an original stamped package.

As I told you yesterday, we haven’t heard a word in this case about purchase. We have heard about whether or not these drugs have Internal Revenue stamps upon them or the containers. There are no Internal Revenue stamps upon these drugs, indicating they were tax-paid. The Government has to prove, as it has, the absence of tax-paid stamps. There is no dispute about that.

Now the Government also has to prove that the defendant had actual or constructive possession of these drugs upon which there were no tax-paid stamps.

I have told you the Government has proven the absence of [263] stamps. Here is the pivotal question: possession.

A Juror: May I sit here. I can't see.

The Court: Certainly. Can you see?

Mr. Landau: I believe I can see all right, your Honor.

The Court: Now, if by the evidence the Government has proved to your satisfaction beyond a reasonable doubt that the defendant, as charged, did have possession of these drugs, there then arises under the law, pursuant to another rule of law, what to the law is known as a presumption of fact, which is a reputable presumption, placing the burden of going forward and explaining satisfactorily that possession as being either lawful, or innocent, or unconscious; lawful, by proving, for example, that it was lawfully acquired; innocent, that nothing was known about it, or that the person didn't know they were drugs; that somebody put them in his pocket and, unknown to him, he was unconscious of carrying them around or having them in his possession. The law then provides that unless that possession is satisfactorily explained, if it is not, then there arises a proposition that that presumption proves and takes the place of independent evidence to prove these two missing links and warrants a conviction.

So you see, as we have said to you, the lawyers and I, the pivotal question is possession. That is how the statute works.

The operation of the other statute under the marihuana act [264] is quite similar. I will just run over it briefly. In essence it is the same. The Government, under this second count has to prove the nature of the drug, which it has proved, and as to which there is no dispute. It has to prove that the defendant was a transferee required to pay the tax imposed on transferees of marihuana. You know what the word "transferee" means. If you transfer something to me, I am the transferee and you are the transferor.

The Government must also prove that the defendant acquired this drug without having paid the tax, and if the Government additionally proves that the defendant possessed the drug and failed after reasonable notice and demand by the Collector of Internal Revenue to produce the order form covering it and required by law to be retained by the transferee—I will just abbreviate that on the board. I repeat, if the Government proves possession and proves also beyond a reasonable doubt the failure of the possessor to produce, after a proper demand, the order form covering that drug, then there arises a presumption, which is reputable, if the defendant in the face of such wishes to go forward and explain that possession, and that presumption, unless explained to your satisfaction, as in the other statute, takes the place of independent, direct proof of these

second and third steps that I have outlined, namely, as the statute says:

“...proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order [265] form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).”

Now, that is, once again, how the statutes operate. Boiled down, in essence the law is that anyone having been proven to be in possession of any drugs has the burden of explaining satisfactorily that possession as being lawful, innocent, or unconscious.

Now, what is the evidence as to possession? For in count 2, like count 1, the pivotal fact which you must be able to find beyond a reasonable doubt to exist upon the evidence, is the fact of possession.

Upon what evidence in this case does the Government rely and contend on the basis of which it has proven to your satisfaction beyond a reasonable doubt the defendant had possession? The evidence is all circumstantial save and except as there may be found by you to be any admissions made by the defendant by word or act.

You will remember the definitions which I gave you yesterday of direct and circumstantial evidence, and that circumstantial evidence, to be of merit, must be consistent with each other, various things established by the circumstantial evidence must be

consistent and consistent with no other hypothesis except that of guilt. [266]

You will remember also the ways in which I defined for you the meaning of the term "reasonable doubt." Just briefly, that must be a doubt based upon reason; that it is not an imaginary, speculative doubt; that it may be a doubt created by the lack of evidence or by the evidence itself, but it is a doubt which is based upon reason, and that you are satisfied beyond a reasonable doubt or beyond all reasonable doubt when you are satisfied to a moral certainty.

The evidence upon which the Government relies, as I recall it—and I repeat, it is not what I recall, it is what you recall—but, as I understand it, the Government relies upon the fact that it served a search warrant upon the defendant. You will recall Mr. Wells' testimony that as he approached the defendant and informed him that he had a search warrant for the defendant's premises. The defendant, as I recall the testimony from Mr. Wells, said "OK," or words to that effect, and he and the officers, with Mr. Wells, then went to the rear house at 803 Hausten Street here in the City and County of Honolulu. When they got there, the door through which they wished to enter apparently was latched, or locked, or something; in any event, the testimony is that the defendant called to someone inside to free the door in some way so that the people could come in; that they did go in; that there in the living room, Mr. Wells testified, he served the search war-

rant upon the defendant and, as required, undertook to read [267] the search warrant to the defendant. The defendant waived the reading of the search warrant.

Mr. Wells further testified about proceeding upstairs and searching a bedroom, which he said was the defendant's bedroom, which he later also called the mauka bedroom.

Wells further testified that after he was called downstairs by Sasaki to see something found upon the search of his assistants, such as was Sasaki, as they were going downstairs, the defendant being with Wells, Wells placed the defendant under arrest.

The Government further, as I understand it, relies, for whatever value it may have, upon a statement made by the defendant to Wells at the time Wells was estimating the grainage content of that small white bottle, which I understand is cocaine. You will recall Wells testified that he estimated it contained about 200 grains, and the defendant ventured the opinion that it contained more than that, or words to that effect.

Then you will recall the Government relies on another element relating to a closet which Wells testified he wished to search. Upon finding it locked, Wells called upon the defendant for the key. Wells testified that the defendant indicated negatively as to the key. I am not saying one way or another just what the defendant said; that is for you to recall. But there was some problem about the key; let's put [268] it that way, the problem being solved,

according to Wells' testimony, by the defendant's calling upon Mrs. Thomas to produce the key, which was produced. The key fitted the door, the door was unlocked, Wells found inside there something which caused him to make a remark which you will recall, to which the defendant, according to Wells, replied, "That was there when I moved in." I think they called that a panel. I will just put the word panel down there as indicative of what I am referring to. It is for you to remember actually what it was.

Next, the Government places some reliance upon the fact that Wells testified at a point of time near the end of the search he was washing his hands in the kitchen and he remarked to the defendant that he had a nice place here and asked him how long he had been living there, to which the defendant made a reply. What the defendant said you know as well as I. I will label that "washing of the hands incident."

Next, I understand the Government to be placing reliance upon what, at or about that same time that I have just referred to, the defendant said and did with reference to Wells, and to be placing reliance upon it despite the fact that at the time the defendant was then and there under arrest. As I have told you, the law is that a person under arrest is not required, and cannot be compelled, to do anything or say anything that may in any way incriminate him, but that, however, [269] the fact that a person may be under arrest does not preclude him from freely and voluntarily, without compulsion or coercion,

doing or saying anything that he may wish to say. Whether these things that followed the time of arrest were free and voluntary acts of the defendant is for you to decide. The incident that I was about to come to as being the next item upon which I understand the Government relies is the fact that the defendant came to Wells making representations to him that Wells shouldn't take, or need not take, Mrs. Thomas, who was found on the premises, to the police station, or take her somewhere in custody, for the reason that she knew nothing about this stuff. I don't purport to be quoting the defendant's exact words. That is the substance of it, as I recall it; it is for you to recall exactly. Whereupon, Wells asked the defendant whether or not then this stuff was his. Wells testified at that point that the defendant shrugged his shoulders and smiled. Does that have any significance? That is for you to determine. We will put down, for lack of a better label, as the smile and shrug.

Next I understand the Government to rely upon the testimony of Sergeant Kinney. I believe it is sergeant; I don't know what the rank is. But you will recall that his testimony was that on this same day in question, that all of the witnesses had been talking about, at the police station, to which the defendant had by Wells been taken under arrest, [270] Kinney talked to the defendant and the defendant talked to him, and that they were talking about guns. Why they were talking about guns we don't know; it is none of our concern; guns are not a part

of this case. But the testimony of Kinney is that they were talking about guns, and, as they did, Kinney says the defendant said to him that he was responsible for everything that was found there and that he had lived there approximately two months. What was the defendant talking about? What did the defendant mean? What is its weight, significance and value in conjunction with the other things upon which the Government relies is for you to determine, not me.

You will also recall that this same witness Kinney testified that he did not so testify at some proceeding in the district court or police court, the exact nature of which we know not what it was, and it is of no concern to us; but that whatever the proceeding was he did not give this information at that time to Counsel who was questioning him on the subject of whether he knew, or not, where the defendant lived. His answers to the questions along that line, you will recall, were, in substance, to the effect that he didn't so testify because he was not asked. How much weight you are going to place on Sergeant Kinney's testimony is for you to determine, tested and measured by the various tests and measurements I have given you as applicable to all witnesses.

Now, there may be other things that the Government relies upon to establish this fact of possession and as claiming on the basis of which they have proven beyond a reasonable doubt that the defendant had possession, I don't know, but those are the things that occur to me that they are relying upon.

I may be mistaken; there may be more or less. It is for you to determine. In any event, there is no reliance or contention made, as I understand it, by the Government that the defendant was in actual, physical possession of these drugs, such possession as I have of this piece of chalk that I have in my hand.

Their contention and argument seems to be that, putting all of these things upon which they rely together and taking all of the evidence into consideration, they believe that by circumstantial evidence and by acts and actions of the defendant they have, they claim, proven to your satisfaction beyond a reasonable doubt that the defendant did have possession and, if they have, there is a burden of going forward as a matter of law, upon the defendant to explain that possession. That is the Government's contention. Whether the Government is right or not, you, and only you, know and can determine.

What do we have on the other side of the picture? We have, first and foremost, the proposition of law that I have told you about, that the defendant is presumed innocent, that [272] he doesn't have to testify in his own behalf, and that no adverse inference may be drawn by you from the fact that he does not testify. You may ask, How is that so if he has the burden of going forward with the evidence to explain possession if we should find from the evidence beyond a reasonable doubt that he did have possession? The answer to that is: The de-

fendant may testify if he wants to, or he may call others to testify for him and to explain that possession, or he may be satisfied that the Government hasn't proved beyond a reasonable doubt to your satisfaction that he did have possession, and he is willing to take the risk of the opinion that he has to explain anything.

The defendant plead not guilty, and to date, as I understand the evidence, he has not, on his side of the case, admitted or explained, during the course of this trial, any possession of these drugs. The only evidence offered by the defense was that these premises at 803 Hausten Street, according to the records of the local Rent Control office of the City and County of Honolulu were premises owned by some landlord at the time in question by the name of Olson, I believe, and rented by that landlord to this Mrs. Thomas that we have heard so much about. From that it would appear to my mind—but what inference you gentlemen are to draw from it is for you, and you alone, to determine—it would appear to me, I say, that the defendant, by that evidence that Mrs. Thomas was the [273] record tenant, it would seem to me that there was a basis made for a possible inference, which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises. This is the same Mrs. Thomas that was mentioned throughout the trial as having also been arrested

at the time of the raid, the same Mrs. Thomas that the defendant, according to the testimony, advised not to talk, the same Mrs. Thomas that the evidence may show the defendant begged Mr. Wells not to retain in custody and take to the station.

Neither the defendant nor the Government has produced Mrs. Thomas. As to the weight and significance that you are to attach to the Rent Control records, that is for you to determine. You will recall, however, that Miss Kellett from that office testified that the office had received a memorandum from a Mrs. Olson saying that she had sold the premises as of August to a Dr. Borja, I believe, and that the Rent Control office had not been able to locate that Dr. Borja to date, and that upon the suggestion Counsel made to the witness as to where the Rent Control office might locate this man here in the city and county of Honolulu, the witness indicated she would follow up that suggestion. I repeat, it is for you to determine how much weight you are to place upon this and any other bits of evidence. You, and you alone, are the sole [274] judges of the weight and significance of the evidence and of the credibility of the witnesses.

Over all, both sides approach one aspect of this problem from the same direction. The Government approaches it from two directions. The Government approaches the problem of the house, the real estate, as does the defendant by the testimony which he has produced, that the problem of the house has this significance, as I told you yesterday when we

were defining more specifically the meaning and significance of the term "posession": On the one hand, from its evidence, the Government would contend that if you find beyond a reasonable doubt that, regardless of who the record tenant was, the defendant was in fact the real tenant of these premises, that it may therefore be said, as a matter of law, that he had constructive possession of the contents and articles in, on, and about those premises. With the same rule of law in mind, the defendant comes forward and says Mrs. Thomas was the tenant and therefore, if there was any personal property on these premises, the indications are that she was the one who possessed the contents of these premises and the things in, on, and about them.

The second angle from which the Government approaches this problem is independent of the house and problem of constructive possession. It secondly approaches the problem directly as to these narcotics, from the standpoint of constructive possession of these narcotics separately and [275] independently from the problem of the house and would no doubt have you believe that it has satisfied you beyond a reasonable doubt that from the things that it relies upon, all put together and weighed and assessed and valued and evaluated it has proven that the defendant had knowing, conscious control and dominion and possession of these narcotics, narcotic drugs, upon the basis of which the Government contends the presumption of law that I have spoken of earlier comes into operation.

Over all, what the law is you must take from me as I give it to you, and not from the lawyers. Whether I am correct or incorrect as to what the law is is my responsibility. I believe I have given it to you correctly and clearly and simply, and that as given to you in these instructions, it should be most adequate to enable you to reach a verdict as to counts 1 and 2.

As to what the evidence is, I repeat, you, and you alone, are the judges of it, how much weight and significance you are to give to it. You are the sole judges of the facts and of the credibility of the witnesses. You are to disregard anything you might think I think. You are to arrive at your own independent judgment, and each and every one of you, in order to find the defendant guilty, must be satisfied beyond a reasonable doubt, as the case stands, that the defendant did have possession of these narcotics. If you are not so [276] satisfied, you must acquit.

A form of verdict has heretofore been prepared for you, but it occurs to me that if, for example, that form of verdict does not correspond with what you gentlemen find, you may use your own form of verdict, for the reason that this form of verdict is simply prepared for your convenience, but there is no special significance to the particular form that we have given to you. In fact, you do not have to write out your verdict at all. You can announce it in open court, if you see fit. It is merely a form after all.

With this review of the law and the evidence I will conclude my remarks, unless there are any questions that you wish to ask me.

Mr. Andre.

Juryman Andre: Your Honor, no questions at this time.

The Court: Very well. Do you want to take any exceptions to anything I have said?

Mr. Soares: I think we have some exceptions.

The Court: Do you want the jury excused?

Mr. Soares: Yes.

The Court: Will the jury step out, please.

(Exit jury.)

Mr. Landau: Before I make the exceptions with reference to the Court's instructions at this time, it is [277] unquestionably understood that any exceptions we have made to previous instructions, for the reasons stated in the Court's chambers will be considered as applying to the same instructions.

The Court: Yes.

Mr. Landau: I take exception to your Honor's remarks and instructions to the jury at this time, first, because it has not in any way taken into consideration the facts and effect of the cross-examination of the Government witnesses. I mean, the Court has been completely silent on certain matters which were brought out on cross-examination which were not either cleared, or even mentioned, in the direct examination.

Second, among your Honor's list of items which the Government relied upon to prove possession and

the items which the defendant used to rebut any inference your Honor has been silent, and I know it is not deliberate, it has been completely silent about the testimony of Officer Case to the effect that he was stationed on Kalakaua Avenue at Barbecue Inn for the specific purpose of watching the defendant's residence at 408 Keanianu Street.

We also except to your Honor's remarks to the fact that neither the Government nor the defendant has produced Helen Thomas. There is no duty upon the defendant to produce any witness. The inference is that we have been remiss in our duty. Actually, it is the Government's duty.

The Court: In that connection I had this in mind, [278] that the defense did undertake some discharge of the burden of going forward with the evidence to explain possession.

Mr. Landau: We did explain possession. And we contend continuously the defendant never had possession, and the Court so stated.

The Court: That is right, but what I am directing attention to is what I am talking about, namely, the evidence that the defendant did put on was an endeavor to show by some way or other that somebody else had possession.

Mr. Landau: That is right. At least, he didn't have possession.

The Court: But the one intimated who had possession was not produced by the defendant.

Mr. Landau: Actually, your Honor, the purpose of the evidence was merely to rebut the infer-

ences from the Government's testimony to the effect that the defendant lived there and therefore he was in constructive possession of the narcotics.

The Court: Well, you are basically right. The defendant doesn't have to produce any evidence. If I left that impression, I will correct it when they come back, but what I was talking about and had reference to was in connection with what he did produce to prove the fact that Mrs. Thomas was the tenant. He produced simply records, not the actual tenant. [279]

Mr. Landau: Of course, it is a question of the weight, plus, of course, that coupled with the testimony of Officer Case that he was watching the defendant's residence at 498 Keanianu it is of considerable significant value.

Mr. Hoddick: I would also like to suggest to the Court, of course it is up to the jury to remember what points we made on which we believed in proving the defendant's possession—

The Court: Yes.

Mr. Hoddick (Continuing): But we consider important the defendant's statement warning Billy Wells not to taste that stuff, that that was dynamite.

The Court: Didn't I mention that?

Mr. Hoddick: No, you didn't.

The Court: I had it on the list.

Mr. Landau: You mentioned the estimate of the grainage, which took place at the same time.

The Court: I dare say they will remember that themselves. I also did stress that I was not pur-

porting to tell them everything, that they are the ones to remember what the evidence was, not me.

Well, the only thing that disturbs me is your Mrs. Thomas' problem. The proposition is this, that the defendant doesn't have to produce any evidence, but if he does produce evidence, they are entitled to measure and test that evidence like any other evidence. [280]

Mr. Landau: That is true. If the defense introduces evidence, it is governed by the same tests as any other evidence is governed, but it doesn't put on the defendant any burden of any testimony whatsoever. It is the Government which has the burden of putting on the evidence, the complete evidence, to show guilt beyond all reasonable doubt, and it is not only that, but they have to produce all available evidence, if the Court pleases, not what they want to pick out, but all that is available. And they haven't done so.

The Court: Well, it is no mystery to me as to why neither of you have produced Mrs. Thomas. I know why, but it is for the jury to find out, if they are concerned as to why.

Well, I will tell the jury, when they come back, that the defendant was under no obligation to produce Mrs. Thomas. He could have produced her if he wanted to on this point of tenancy, but he was under no obligation to do so, or to produce any evidence.

Mr. Landau: The Government could have produced Mrs. Thomas for rebuttal of inferences, or anything, which they failed to do.

The Court: I have already told them that, that neither side produced Mrs. Thomas.

Mr. Landau: My contention is we are not under the same compulsion of production of witnesses as the Government is, but your Honor perhaps unconsciously has given the jury [281] the impression that we have the same duty of producing Mrs. Thomas as the Government.

The Court: The Government has no duty to produce Mrs. Thomas.

Mr. Landau: Or produce a witness.

The Court: The Government has no duty to produce a witness. All the duty it has is to present its case in any way it sees fit.

Anything else?

Mr. Landau: No, your Honor.

The Court: All right, call the jury back, please. Just a minute.

Mr. Landau: Is the Court going to comment on Case's testimony also, in view of what the Court has said?

The Court: I agree with you, Case did say that. If I call their attention to that, I will also tell them as a matter of law a man can have more than one residence. I think you would rather have me leave it alone, wouldn't you?

Mr. Landau: It is entirely up to the Court.

The Court: I will simply tell them, as they come back, what I think I have already told them, that what I mentioned to them or what I recall or what I call their attention to is not to be regarded par-

ticularly; they are the ultimate judges of all of the evidence. They know what all of the evidence was and they are to base their decision on all [282] of the evidence.

All right, have the jury come back.

(Jury returns.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Gentlemen of the jury, my attention has been called to one or two things that I want to mention to you, in addition to that which I have said previously.

I made some reference in my recent instructions to you about neither the defendant nor the Government producing Mrs. Thomas. I want you to clearly understand that the defendant has no obligation to produce any evidence or any witness, but if he does, that evidence and those witnesses are to be tested in the same manner as you test and weigh the evidence and credibility of any witness.

Similarly, the Government doesn't have to produce any witnesses unless it wants to, but it does have the burden of proof.

There has also been some intimation that perhaps I didn't make as clear to you as I should have, and which I will now try to do, that irrespective of what I have done by way of reviewing the evidence, you gentlemen know full well what all of the evidence is and you are to base your verdict on your assessment and evaluation and measurement of all of the evi-

dence, whether it be given on direct or cross-examination, and to [283] disregard my brief review of it. I may have omitted or emphasized certain things. If so, those omissions or particular emphases are to be disregarded as of no significance or importance, and on all of the evidence by all of the witnesses you are to base your determination, but, as I have told you ninety-nine times, but will tell you now for the last time, you, and you alone, are the sole and exclusive judges of the facts to be drawn from the evidence and from the credibility of the witnesses.

With that, the court will stand at recess once again and, after clearing the court room, turn the court room over to you as your jury room; and after the court room is cleared and delivered to you by the Marshal as a jury room, you may resume your deliberations and the Court will await your decision.

(Thereupon, at 10:20 a.m. the jury retired for further deliberations.)

(At 3:40 court reconvened.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

I am in receipt of a note from the jury reading as follows:

“Judge McLaughlin:

“Our jury respectfully requests:

“(1) Transcript of direct examination and

cross-examination [284] of Agent Wells, Officer Case, Officer Sasaki.

“(2) Permission to examine the premises at 803 A and 807 Hausten St.

“/s/ L. F. ANDRE,

“Foreman.

“3:30 p.m.

“January 11, 1949.”

Gentlemen, I will grant your requests in reverse order; due to the time of day I think it is advisable that we go and take the view now during the daylight hours. A bus awaits without, or will be there by the time I get through talking.

The view which we will take is not evidence, but is simply to better enable you to evaluate and understand the evidence which you have heard here in court.

We have ascertained that the premises are available for our inspection. There is no way of knowing whether or not they are in the same condition now as they were at the time testified to in court here, but you can see that for yourselves one way or another.

In your request do you mean to imply that you want to go into the house as well as look around it?

Foreman Andre: Your Honor, it is the jury's wish.

The Court: Yes or no?

Foreman Andre: It is the jury's wish to go into both houses. [285]

The Court: Into both houses. I don't know about 807 Hausten Street, as to whether we can go in there or not. I gathered from the testimony there were some apartments there. The only duplexes, or whatever it is that was testified to, were described without name. I have no way of knowing whether we can obtain permission to go there or not, but we will knock at the door and ask.

Foreman Andre: It is the jury's wish that we go to the same apartment that the officers were in before the raid.

The Court: Is Agent Wells here?

Mr. Hoddick: I can get him, your Honor.

The Court: You see if we can arrange that, so we can do that when we get there. We will do everything we can do. We will ask. If they refuse, that is it.

Foreman Andre: We wish to proceed from 807 to 803 A in that order, if your Honor please.

The Court: We will endeavor to comply with that. I will not allow any questions at the time of viewing. You are just there to look. We will show you what I presume is 807 and we will show you what is 803, and we do have permission to examine 803 A. I have no way of knowing who is in 807.

Then we will come back to court, and since we can't turn out transcripts like a linotype machine, the best we can do is to have the court reporters read to you the transcript of the testimony that you asked for. [286]

So, without further delay, unless there are some

little things I have forgotten to mention—oh, yes, I want everyone, the lawyers, the jury, the defendant, the Court, the Clerk, and one reporter to go with us in the bus; I want everybody to stay together. I don't want any talking about the case during the view, I repeat. It is not evidence; we are simply there to look. We will come directly back to the court.

All right, Mr. Marshal, have you the bus ready? Marshal Heine: Yes, your Honor.

The Court: All right.

(Thereupon, at 3:45 p.m. an adjournment was taken to view the premises.)

5:05 p.m.

The Court: Note the presence of the jury and of the defendant, together with his attorneys. We have just returned from the taking of a view of 807 Hausten Street and 803 A Hausten Street. As I heretofore told you, gentlemen, that view is not evidence, but simply a view to better enable you to understand and evaluate and weigh the evidence. As I told you before we took the view, we do not know whether those premises are now in the same condition as they were at the time of the testimony. This is January, 1950, and the date in the case is on or about July 16, 1949, so we do not know, I say, whether the premises are now in the same condition they were then or not. [287]

Now, you have asked that certain portions of the evidence be read to you. I believe the first one you

asked for was—well, let's take them in order, the order in which they testified. I think Sasaki was asked for, and he was the first witness, was he not?

Mr. Landau: Yes, your Honor.

The Court: All right, let's read it first. And, Mr. Reporter and Miss Reporter, when you do read, be sure to read good and loud. If you want to stop and take a breath, just do so.

(Examination of Officer Richard Sasaki read by reporter.)

The Court: Do you want to stretch your legs before we take the testimony of another witness?

The Jury: Yes.

The Court: We will take a short recess.

(Recess had.)

The Court: Note the presence of the jury and of the defendant and his attorneys.

(Testimony of Roy F. Case read by reporter.)

The Court: Do you want to go to supper now or do you want to hear Mr. Wells' testimony?

Foreman Andre: Your Honor, the jury respectfully requests that we hear Mr. Wells' testimony.

The Court: Yes.

Foreman Andre: And that we go to dinner, and because [288] of the late hour last night, very late deliberations, that we be excused until 10 o'clock.

The Court: Ten o'clock?

Foreman Andre: Yes.

The Court: Are you going to sleep late in the morning, or do you first go to breakfast at the Young?

Foreman Andre: Yes, sir.

The Court: I think that is reasonable.

Mr. Landau: No objection.

Mr. Hoddick: No objection.

(Testimony of William K. Wells read by the reporter.)

The Court: Very well, gentlemen, I take it you have now had read to you that which you asked for. Is there anything else you want read to you?

Foreman Andre: No, sir, not at this time, sir.

The Court: Very well. Under the same admonitions and instructions that I have heretofore given you as to conduct, the Court at this time will stand adjourned for the day to allow you gentlemen to go to supper and thereafter to retire if you so desire, but, at any rate, not to deliberate further today; and you are to resume your deliberations here in the court jury room at 10 tomorrow morning.

Juryman Mulder: May I have permission to try to get my wife. The 'phone was out of order. I still haven't been able to get her. And in the presence of the Marshal, of [289] course.

The Court: Yes, you may. Any other personal calls?

Mr. Wills: I would like to have permission to call.

The Court: I think after the time that has

elapsed they should be able to do their own calling.

Mr. Landau: I think their wives would probably be glad to hear their voices.

The Court: All right, if you will make the calls short and direct to the point and only about personal matters, the Marshal will allow you to call from his office and under his supervision. The Marshal himself will not be with you but two of his deputies, Mr. Clark and Mr. Bruns. All right, Mr. Bruns.

Mr. Bruns: Yes.

The Court: Until 10 tomorrow.

(Thereupon, at 7:10 p.m., January 11, 1950, an adjournment was taken until 10 o'clock a.m. when the jury was to return for continued deliberation.) [290]

January 12, 1950

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

I have been notified by the Deputy Marshal that the jury has at long last arrived at a verdict; is that correct, Mr. Andre?

Foreman Andre: Yes, your Honor.

The Court: And you are the foreman of the jury, as we know from prior messages received; that is correct, you are the jury's foreman?

Foreman Andre: Yes, sir.

The Court: Will you please give the verdict to the Clerk. The defendant will rise.

Mr. Clerk, you will announce the verdict.

The Clerk: Omitting the heading and title:

“As to Count I of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Winston Churchill Henry, guilty.

“As to Count II of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Winston Churchill Henry, guilty.

“Dated: Honolulu, T. H., this 12th day of January, [291] 1950.

“/s/ LEO F. ANDRE,  
“Foreman.”

The Court: Such, Mr. Foreman, is the verdict of the jury?

Foreman Andre: Yes, your Honor.

The Court: So say you all, gentlemen of the jury?

The Jury: Yes, your Honor.

The Court: I would like to call you by individual names and have you answer, just so the record will be complete.

Mr. Cook, is that your verdict?

Juryman Cook: Yes, your Honor.

The Court: Just answer “yes” or “no” without standing up.

Juryman Cook: Yes.

The Court: Mr. Mulder?

Juryman Mulder: Yes, your Honor.

The Court: Mr. Mosher?

Juryman Mosher: Yes, your Honor.

The Court: Mr. Kramer?

Juryman Kramer: Yes, your Honor.

The Court: Mr. Webb?

Juryman Webb: Yes, your Honor.

The Court: Mr. Todd?

Juryman Todd: Yes, your Honor. [292]

The Court: Mr. Wills?

Juryman Wills: Yes, your Honor.

The Court: Mr. Kruse?

Juryman Kruse: Yes, your Honor.

The Court: Mr. Andre?

Foreman Andre: Yes, your Honor.

The Court: Mr. Moyers?

Juryman Moyers: Yes, your Honor.

The Court: Mr. Kina?

Juryman Kina: Yes, your Honor.

The Court: Mr. Richardson?

Juryman Richardson: Yes, your Honor.

The Court: Very well, let the verdict be recorded.

Mr. Landau: If your Honor please, we take exception to the verdict as contrary to the law, contrary to the evidence, contrary to the weight of the evidence, and hereby give notice of motion for a new trial.

The Court: The same may be noted upon the record.

At this time the jury is excused until called as part of the regular panel once again to serve. At the moment I have no exact dates in mind, but it

will be not too far distant, but if you are called for future service, I will bear in mind that you have served these many days and will take that into consideration should you have any requests to be considered for being excused. I am not saying that you are going to be [293] excused from further service simply because you have served here, but I will remember that you have served.

Thank you very much for your service. At long last you may go home.

(Jury excused.)

(Discussion as to bond and setting for sentence.)

(Thereupon, at 3:00 p.m., January 12, 1950, court was adjourned.) [294]

January 26, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry. Hearing on motion for a new trial.

The Court: Mr. Landau, you desire to have this matter called up for disposition in chambers?

Mr. Landau: Yes, your Honor.

The Court: And whatever rights you might have to have it conducted in open court you waive?

Mr. Landau: We certainly do.

The Court: And you also waive the right of the defendant to be present?

Mr. Landau: That is correct.

The Court: Indeed, to put it reversely, it is at

your request that we are taking this motion up in chambers.

Mr. Landau: That is correct.

The Court: Do you wish to be heard upon the motion?

Mr. Landau: In view of the fact that this matter has been discussed informally, I just want to make a statement for the record. On the day of the verdict we gave notice of a motion for a new trial. The motion itself was not filed within the five-day period set by the Rules of Criminal Procedure, Section 33. However, Section 37(a)(2) indicates, or at least there is an inference there, that after judgment [295] and within the ten-day period allowed for an appeal a motion for a new trial can be filed, and the time for taking the appeal, that is, the ten-day period for taking the appeal, begins upon the decision of the judge on the motion for a new trial which comes after the judgment of sentence; and I submit, if the Court pleases, that we are entitled to have a hearing on the motion for a new trial even though it was not filed within the five days set by Section 33, since it has been filed, certainly, within the ten-day period, or, rather, before the ten-day period for taking an appeal from the judgment of conviction.

The Court: Starts to run before that.

Mr. Landau: Yes, and I submit, if the Court pleases, that not only that, but Rule 33 says: "The court may grant a new trial to a defendant if required in the interest of justice." Exactly how that

would apply in this particular instance I am a little hesitant to indicate. I believe, however, that that does seem to give the Court considerable leeway, in spite of the five-day rule, apparently as a result of certain decisions being indicative that it is jurisdictional.

The Court: Well, that part of the rule has reference to a situation where the Court, upon its own motion, regardless of whether the rule for a motion for a new trial has or has not been complied with, observes itself something so [296] flagrantly wrong with the case that, rule or no rule, it will in the interest of justice grant a new trial.

Mr. Landau: Without time limit.

Mr. Hoddick: If we are going to go through this point by point, the Supreme Court case that Counsel called to my attention——

Mr. Landau: I didn't call it to your attention. I happened to mention I know there was a case.

Mr. Hoddick: United States vs. Smith, 331 U. S. 469. That first sentence does not give the Court authority to grant a motion for a new trial.

The Court: What, then, is the meaning of the phrase, "The Court may in the interest of justice do thus and so"? Where is that phrase?

Mr. Hoddick: "Moreover, it would be a strange rule"——

Mr. Landau: The first line of Section 33.

Mr. Hoddick: "Moreover, it would be a strange rule which deprived a judge of power to do what was asked when request was made by the person

most concerned, and yet allowed him to act without petition. If a condition of the power is that request for its exercise be not made, serious constitutional issues would be raised. For it is such request which obviates any later objection the defendant might make on the ground of double jeopardy."

The Court: I don't know the exact nature of this [297] Smith case, but I know, rule or no rule, if I were satisfied there was something flagrantly wrong with this trial, I would grant, on my own motion, a motion for a new trial, and we would have a new trial before it ever got to the Supreme Court.

Mr. Hoddick: It is also held in this case that motion must be made within five days. Here it was filed late, and they argued by virtue of this first line the Court could, by its own motion, do it.

Mr. Landau: You have a little different situation. The judge decided to grant a new trial the same day that the Circuit Court of Appeals affirmed the verdict down below, so you have a situation which may have been even more jurisdictional. The appeal having been effected, the court about to render its decision, the court below might be out of its jurisdiction.

The Court: Interesting as that may be, it is not our case, although you allude to that as a possibility.

Mr. Landau: That is right. And of course the only way the court could ascertain whether the court should on its own motion grant a new trial

in the interest of justice would be to determine whether or not those matters which I have submitted in the motion are of sufficient weight and importance to have the court correct any possible error which it may have made down below.

The Court: All right. What is your position?

Mr. Hoddick: With reference to that, first I would argue that the court is without power to grant a new trial on its own motion after the expiration of the five-day period, unless, of course, the defendant should come in with newly discovered evidence, which is not the case here; in which case he could do it on his own motion.

I would also submit that this defendant had a fair trial, that the rulings of the Court were correct, and that the defendant is not entitled to a new trial. There is sufficient evidence to support the verdict.

Mr. Landau: We believe, of course, that we have protected the record and come within the five-day period by a notice of a motion for a new trial filed within the five days, even though it was oral, and that what we have subsequently done is not file a new motion, but merely write out the reasons specifically for the motion for a new trial. We believe, therefore, that we do come within the five-day rule and the motion is properly to be heard before this Court.

Mr. Hoddick: My recollection of what took place, and we would have to check with the reporter to find out, is that you people took exception to

the verdict as being contrary to the evidence and contrary to the law and indicated you would file a notice of appeal. I don't remember you or Mr. Soares' saying anything concerning a motion for a new trial at that time. [299]

The Court: Be that as it may, the record speaks for itself on that score, but I think I can dispose of this motion as the argument now stands.

If you did give notice of intention to file a motion, the rule nevertheless requires that the motion be filed, under Rule 33, within five days after verdict, or obtain an extension of time for good cause, shown within that same five-day period. Obviously, that Rule 33 has not been complied with. As to the possibility of such a motion as this coming to me within the provisions of Rule 37(a) (2), it is my position that that rule has reference to an entirely different factual situation and has primary reference to the calculation of the time within which an appeal is to be governed, and, finally, that if, under such a construction as you, Mr. Landau, place upon the phrase, beginning "but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion," that in any event the general governs are specific and Rule 33 is the cardinal guiding rule, and not any ambiguity in Rule 37(a) (2). Actually, in my opinion Rule 37(a) (2) has reference to where, for example, after verdict, sentence and judgment fol-

lowed, and the ten days began to run, and during the running of that ten-day period you filed, pursuant to Rule 33, within five days a motion for a new trial. [300]

As to the power that the Court might have, regardless of the non-compliance with Rule 33, to grant a new trial upon its own motion in the interest of justice, I think I do have such power. I think this is different from the Smith case, and to that end I have examined the grounds alleged in the motion for a new trial. By and large, most of them are objections and motions which were made during the course of the trial and ruled upon, and to the rulings then and there made I adhere.

The only new matter that attracts my attention is the ground asserted that there was no proof that a crime had been committed except as you made applicable such acts and admissions as by evidence the Government introduced as attributable to the defendant; or, stated differently, your contention here made is that the crime must be established beyond a reasonable doubt by the Government, over and beyond and separate and apart from any admissions on the part of the defendant. As I told you the other day when we discussed this matter informally, that attracted my attention considerably. Upon analysis I think that that rule is not here applicable for the reason that once the Government, in a case such as this, establishes that there were found narcotics which were not aban-

doned and which did not have tax-paid stamps thereupon and were obviously not in or from an original stamped package, it has established that a crime was committed. It must go forward, then, and prove that "X" committed that [301] crime.

Mr. Landau: May I be permitted—

The Court: No, you may not, because that will go 'round and 'round in a circle again.

As to the other contention that—You may not now. When I get through, I will hear you.

As to the other contention which strikes me as new, namely, that when, after the jury had deliberated for some hours, it, late at night, asked the Court to have available for its consideration in the morning a transcript of the Court's instructions, I then told them, as I did on the next morning, that I could not produce a transcript in that short period of time, and even if I could I doubted if I would give that to them, but would handle their request by reviewing the instructions, and did so by instructing them over again, in the course of which I also reviewed some of the evidence for them, that matter to which you refer in your motion I do not think is error, in that I do not think that I committed any error. I think my instructions were proper, my review of the evidence was in order, I had the right to do it in the beginning and, if I had the right to do it then, I had the right also to do it at the time the jury requested further instructions. As to any comments on the evidence that I may have made, I believe the record will

reflect that I adequately told the jury that if I should unintentionally [302] make any comment on the evidence, that they were to disregard it because I was not desirous of invading their province, and that they, and they alone, were the ultimate judges of the facts.

For those reasons, if I could get to the merits of your motion I would deny it, but primarily I do not think under the rules that the Court is able to get to the merits of your motion or to review it again. Under the rules this motion is not reachable, in my opinion, because of non-compliance with Rule 33; but, if, under the phrase in that rule "in the interest of justice, I, on my own motion, could reach it, I would still deny the motion for the reasons indicated.

Now, you wanted to say something and now I will hear you.

Mr. Landau: Yes. I would like to indicate, of course, that the corpus delicti—in this offense it is narcotics as distinguished from marihuana, but the effect would be the same—is the purchase. They don't have any direct evidence of purchase. However, the statute permits them to prove certain things, and if those things have been proven beyond a reasonable doubt, then the crime will be considered as having been proven. In other words, if we prove that they were narcotics, that they were not from stamped packages, and that they were in the possession of the defendant, the jury or the court will be entitled to believe that there has

been a purchase, and that is the *corpus delicti*. [303]

The Court: That is the whole case.

Mr. Landau: It is one of these cases where it happens to be the whole case. But if all the Government proved was the fact that they were narcotics and they were not from stamped packages, they would not have been able to prove the purchase, even though they prove that they were not abandoned. There must be purchase; there is the offense. In other words, the purchase is somebody selling it to the defendant, the defendant buying it, some consideration paid, and title transferred.

The Court: That is the ultimate thing.

Mr. Landau: That's right. That is the thing. You cannot prove it by only two of those elements; you must prove it by the two elements plus proof of possession.

The Court: It is the same argument over and over again. You throw into that picture possession of the defendant.

Mr. Landau: That's right.

The Court: My position is that a crime under this statute has been shown if the Government produces evidence that in some situation described by the evidence which is short of abandonment or short of being unable to say that somebody had possession; for example, if you found drugs in the middle of the highway, as contradistinguished from finding them, as the evidence here showed, in a house, if you find drugs under those circumstances in a person's house, regardless [304] of whose house it is—

remove entirely the label of whose house it is—but you find them in a dwelling and they are not in an original stamped package and do not bear tax-paid stamps, then the presumption exists, on that fact alone, that a crime has been committed. Then they have got to go forward and show who committed that crime, which, under these circumstances, they must show by showing that that possession was "X's" possession.

Mr. Landau: Your Honor stated it almost better than I would have dared. You have stated that they had to prove somebody's possession and, having proved somebody's possession and all the other elements, they have proved that a crime has been committed. Then they have the additional duty—

The Court: To show who did it.

Mr. Landau: To show who did it.

The Court: Yes.

Mr. Landau: But the possession is a necessary element on the crime, the fact that a crime has been committed.

The Court: Yes.

Mr. Landau: So the possession must be proved by something other than his statements or his acts. In other words, had they had outside evidence that the defendant lived there, that this room was actually his, and that he slept there, then you would have had a different situation. And I submit under Kinney's testimony, as he gave it down at the [305] district court of Honolulu it would have been more weighty than the testimony he gave here, because

he was down there and testified that in his opinion the defendant lived in that house, because of the fact that he had seen this Packard car three different times in the two weeks prior. He didn't testify to a thing about that in this court, so we don't have any independent testimony that defendant lived there at 803 Hausten Street, but they could have had it had they used it.

The Court: The proposition I advance and adhere to is that, under this particular statute, upon the evidence here, regardless of whose house it was, upon these premises the officers found these drugs, thus indicating, this not being an abandoned house, that somebody had those drugs in possession, then and there they established the *corpus delicti*, and from there on it was simply necessary for the Government to establish by the necessary degree of proof that "X," or the defendant, was the one who had them then and there in possession.

Mr. Hoddick: Of course, that would be the same answer that I would make to Mr. Landau. I would also like to call attention to one statement that I got from 67 Fed. (2d) 4, Fourth Circuit Court of Appeals:

"The rule does not require that the independent evidence of *corpus delicti* shall be so full and complete as to establish, unaided, the commission of a crime. It is sufficient that the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of defendant's guilt beyond a reasonable doubt." [306]

Mr. Landau: That is where they have at least some evidence outside of the confession.

The Court: The "some evidence" here is the finding of these drugs on these premises, drugs which did not have tax-paid stamps.

Mr. Landau: That is the point we have been making all the way through. It is not exactly a new point. We have discussed this many many times.

The Court: Yes, but discussed it in such a way that this particular rule of law, to which you call my attention, had not previously come to my direct attention.

Mr. Landau: Not specifically.

The Court: Throughout the trial that has been one of your general contentions, although until you worded it this way, I didn't catch it in this light. So, for the reasons previously outlined, I am denying the motion for a new trial.

Mr. Landau: And, if the Court pleases, may the record also show that the second new point, which your Honor averted, was a point which it was impossible for us to make properly, that is, in any other way, actually, because your Honor had said you didn't want us to make any objections until after you were through with your remarks to the jury. At that time the remarks had been made and any objections would have been futile. [307]

The Court: I can't agree with that. I can agree I told you not to interrupt me while I was talking to the jury, but to make notations as to any objections you wished to make and I would hear you at the end.

Mr. Landau: That is right.

The Court: You did make some objections. You did not make this particular objection; and as to one, at least, of the objections you mentioned, when the jury came back I did make an alteration in what I had said to them about the obligation of the defendant to testify or to produce witnesses.

Mr. Landau: That is right. That was on a question of law rather than direction as to evidence.

The Court: So that, in fairness to me, you must admit that had you thought of it, you could have also claimed then and there that I invaded the province of the jury.

Mr. Landau: Yes, we probably could have called it to your attention more specifically than we did, but again I say even had we done so—

The Court: I would have ruled against you.

Mr. Landau: And had you even ruled in our favor, the damage, if any, would have been done, and you couldn't erase from the jury's mind what your Honor had said.

The Court: Period.

Mr. Landau: May I take an exception to your Honor's ruling? [308]

The Court: Yes. All right, let's go into court now.

(Thereupon, at 2:06 the hearing in the above-entitled matter was adjourned.) [309]

January 26, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, for sentence.

(Discussion by Court and Counsel.)

The Court: As to Count 1 of this Indictment on which the defendant has been found and adjudged guilty, it is the judgment and sentence of the Court that he stand committed to the custody of the Attorney General for placement by him in an institution of the prison type for a period of four years, and in addition pay a fine of \$1,000.

As to Count 2 of the Indictment, as to which he has also been found guilty and adjudged guilty, it is the judgment and sentence of the Court that he stand committed to the custody of the Attorney General for placement by him in an institution of the prison type for a period of two years and pay a fine of \$1,000, both sentences to run consecutively.

The defendant is committed to your custody, Mr. Marshal, for execution of the sentence.

Mr. Landau: If the Court please, I take exception to the Court's sentence. May we give notice of appeal. May the defendant be released on his bond pending the filing of the notice of appeal.

(Discussion by Court and Counsel.)

(Thereupon, at 3:40 p.m., January 26, 1950, court was adjourned.) [310]

## Reporters' Certificate

We, the Official Court Reporters of the U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of proceedings in Criminal No. 10,253, United States of America, Plaintiff, vs. Winston Churchill Henry, Defendant, held in the above-named court on January 4, 5, 6, 9, 10, 11, 12, and 26, 1950, before the Hon. J. Frank McLaughlin, Judge, and a Jury.

/s/ ALBERT GRAIN,

/s/ LUCILLE HALLAM.

Mar. 20, 1950.

[Endorsed]: Filed April 20, 1950 U.S.D.C.

[Endorsed]: Filed May 1, 1950 U.S.C.A.

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[Endorsed]: No. 12534. United States Court of Appeals for the Ninth Circuit. Winston Churchill Henry, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed May 1, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12534

WINSTON CHURCHILL HENRY,  
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,  
Plaintiff-Appellee.

DESIGNATION OF RECORD TO BE PRINTED  
ON APPEAL

Comes now Winston Churchill Henry, Defendant-Appellant in the above-entitled cause, by Landau & Fairbanks and O. P. Soares, his attorneys, and hereby designates for inclusion in the printed record on appeal the following:

1. Indictment filed September 15, 1949.
2. Motion for Bill of Particulars filed September 27, 1949, together with Affidavit thereon.
3. Motion to Transfer Case from the District of Hawaii and Affidavit filed October 26, 1949.
4. Clerk's Minutes of September 28; October 5, 7; November 1, 9, 10, 1949; January 4, 5, 6, 9, 10, 11 and 12, 1950.
5. Defendant's Requested Instructions 1, 2, 3, 6 and 8 which were refused by the Court and Govern-

ment's Instructions 9 and 10 given by the Court over objection of Defendant.

6. Official Reporter's Transcript of Evidence taken and proceedings had during the argument on the Motion for Bill of Particulars and the Motion to Transfer Case from the District of Hawaii and during the trial, including all statements made by the Court to the jury during the deliberation of the jury.

7. Exhibits introduced by Defendant during hearing on Motion to Transfer Case from the District of Hawaii.

8. Motion for New Trial filed January 23, 1950.

9. Clerk's Minutes of January 26, 1950.

10. Official Reporter's Transcript of Testimony taken on January 26, 1950, during argument on the Motion for New Trial and the actual Sentence of the Court and exception thereto.

11. Judgment of Sentence of the Court.

12. Notice of Appeal filed February 3, 1950.

13. Election of Defendant filed February 3, 1950.

14. Bond filed February 3, 1950.

15. Cost Bond filed February 3, 1950.

16. Amended Designation of Record on Appeal filed April 14, 1950.

17. This Designation of Record to be Printed on Appeal.

18. Defendant's Statement of Points to be Relied Upon on Appeal.

Dated: Honolulu, T. H., this 14th day of April, 1950.

WINSTON CHURCHILL  
HENRY,  
Defendant-Appellant.

By LANDAU & FAIRBANKS and  
O. P. SOARES,  
His Attorneys.

By /s/ SAMUEL LANDAU.

Service admitted.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED  
ON APPEAL

Comes now the United States of America, Plaintiff-Appellee in the above-entitled cause, by Ray J. O'Brien, United States Attorney for the District of Hawaii, and hereby designates for inclusion in the printed record on appeal the following:

1. All instructions given by the Court.
2. Affidavit and search warrant.
3. Designation of Record on Appeal filed April 25, 1950.
4. Amended Designation of Record on Appeal filed April 25, 1950.
5. This Designation of Record to be Printed on Appeal.

Dated: Honolulu, T. H., this 25th day of April, 1950.

UNITED STATES OF  
AMERICA,  
Plaintiff-Appellee.

By /s/ RAY J. O'BRIEN,  
United States Attorney,  
District of Hawaii.

Service admitted.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON BY DEFENDANT-APPELLANT ON  
APPEAL

Comes now Winston Churchill Henry, Defendant-Appellant in the above-entitled cause, by Landau & Fairbanks and O. P. Soares, his attorneys, and in conformance with Rule 9 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit hereby states that it is intended that the Defendant-Appellant shall rely upon the following points:

1. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's Motion for Bill of Particulars.
2. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's Motion to Transfer the Case from the District of Hawaii.
3. That the United States District Court for the District of Hawaii erred in permitting a material witness for the United States to remain within the courtroom during the trial of the cause after the witnesses had been placed under the rule of exclusion.
4. That the United States District Court for the District of Hawaii erred in admitting in evidence United States Exhibit F (No. 7 for identification).

5. That the United States District Court for the District of Hawaii erred in denying Defendant-Appellant's motion for a mistrial as a result of the publication during the course of the trial of an article in a local newspaper.

6. That the United States District Court for the District of Hawaii erred in denying Defendant-Appellant's motion to strike the testimony of Government witnesses, to wit, police officers of the Honolulu Police Department, acting under the direction of agents and employees of the United States, and agents and employees of the United States, relating to acts of and conversations with the Defendant-Appellant for the reason that at the time of those acts and conversations the Defendant-Appellant was under illegal arrest.

7. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion to strike the testimony of Officer Kinney relating to a conversation between the witness and Defendant-Appellant concerning an investigation being conducted by Police Officer Kinney.

8. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion to strike the testimony of H. A. Patterson concerning the making of a demand for the production of forms on September 27, 1949, and giving Defendant-Appellant until September 30, 1949, to produce those forms.

9. That the United States District Court for the District of Hawaii erred in denying Defendant-Appellant's motion for a Judgment of Acquittal as to both counts generally and as to Counts I and II specifically.

10. That the United States District Court for the District of Hawaii erred in its instructions to the jury in that it imposed on Defendant-Appellant a duty of explaining possession at a time when possession of the articles alleged in the indictment had been denied.

11. That the United States District Court for the District of Hawaii erred in its instructions to the jury in stating that the fact that the drug in Count II was marijuana had been proven, in effect taking away from the jury the question for them to decide whether the articles were or were not marijuana.

12. That the United States District Court for the District of Hawaii erred in its instructions to the jury in stating that no satisfactory explanation had been made by the defense of the possession of the articles alleged in the indictment, thus indicating to the jury that the Defendant-Appellant did in fact have possession, taking that question away from the jury.

13. That the United States District Court for the District of Hawaii erred in instructing the jury that if they could not arrive at a unanimous verdict of guilty the Defendant-Appellant would have to

be acquitted, thus removing from the jury the possibility of a "hung" jury.

14. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 2.

15. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 1.

16. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 3.

17. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 6.

18. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 8.

19. That the United States District Court for the District of Hawaii erred in giving United States' Requested Instruction No. 9.

20. That the United States District Court for the District of Hawaii erred in giving United States' Requested Instruction No. 10.

21. That the United States District Court for the District of Hawaii erred in giving to the jury additional instructions on the question of possession after the jury had retired to deliberate, the said instructions then given being misleading and not proper statements of the law.

22. That the United States District Court for the District of Hawaii erred in answering the jury's request for a transcript of the Court's instructions after the jury had retired for its deliberation by giving the jury instructions, some of which were misleading and not proper statements of the law, by discussing and commenting on the evidence, which in effect was an argument to the jury, while the jury was in deliberation and after the Court had said it would not comment on the evidence.

23. That the verdict of the jury was contrary to the law, contrary to the evidence and contrary to the weight of the evidence.

24. That the United States District Court for the District of Hawaii erred in denying the Motion of Defendant-Appellant for a New Trial.

25. By reason of said errors and other manifest errors appearing in the record designated herein, the judgment of conviction should be set aside.

Dated: Honolulu, T. H., this 20th day of April, 1950.

WINSTON CHURCHILL  
HENRY,  
Defendant-Appellant.

By LANDAU & FAIRBANKS and  
O. P. SOARES,  
His Attorneys.

By /s/ SAMUEL LANDAU.

